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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Dennis R. Patrick, Chairman

James H. Quello

Patricia Diaz Dennis

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Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MOBILFONE SERVICE, INC. File No. 23960-CD-P/L-01-85

For Additional Facilities
to operate on the Frequency
454.650 MHz for Station WXS204
in the Domestic Public Land
Mobile Radio Service
at East Liverpool, Steubenville,
and Bellaire, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1989; Released: March 13, 1989

By the Acting Chief, Mobile Services Division:

1. Mobilfone Service, Inc. (Mobilfone) has filed the captioned application for additional two-way facilities to operate on frequency 454.650 for Station WXS204 at East Liverpool, Steubenville, and Bellaire, Ohio. James M. Pelley d/b/a Jim's 2-Way Radio (Pelley) has filed a petition to deny the application. Responsive pleadings have been filed.

BACKGROUND AND CONTENTIONS

2. Mobilfone is licensed to operate two-way facilities for Public Land Mobile Service (PLMS) Station WXS204 on frequency 454.150 MHZ at Empire, 454.200 MHz at Steubenville, and frequency 454.325 MHZ at Martins Ferry, Ohio. Pelley is the licensee of PLMS Station KDS430 at East Liverpool, Ohio.

3. In its Petition to Deny, Pelley makes three challenges to the Mobilfone application. First, the reliable service contours of Mobilfone's proposed facilities at Steubenville and Mobilfones's existing facilities at Empire, Ohio will overlap by more than fifty percent which requires Mobilfone to provide a traffic load study for the facilities at Empire, Ohio pursuant to Section 22.16 and Section 22.516(a)(2) of the Rules, which Mobilfone has not provided. Second, Mobilfone has four facilities located within forty miles of its proposed facilities but the application fails to identify these facilities as required by Section 22.15(i)(2) of the Rules. Third, Mobilfone's proposed facilities are incapable of providing two-way service as required by Section 22.501(b) of the Rules.

4. In opposition, Mobilfone states that a traffic load study for the Empire, Ohio facility was contained in the application. Nevertheless, Mobilfone has provided, as an amendment to its application, a new, updated traffic load study for its existing channels at Empire and Steubenville, Ohio.[1] Mobilfone further states that Station WQZ605 was identified in its application. Station WQZ605, Mobilfone states, operates only three base station facilities on frequency 43.66 MHz,[2] and one control facility on frequency 72 MHz. Hence, Mobilfone states, Pelley's petition to deny presents no factual basis for its allegations that Mobilfone's application is defective, and should be dismissed.

5. In reply, Pelley argues that despite Mobilfone's amendment, Mobilfone still fails to identify its authorized control facilities. In addition, Pelley argues that Section 22.16(a)(2)(i) of the Rules requires that an existing system serving both one-way paging and two-way units provide separate one-way and two-way loading data. Mobilfone's application, Pelley argues, fails to provide separate loading data for its existing facilities at Martins Ferry, Ohio as required by Section 22.16 of the Rules.

6. On March 2, 1988, Mobilfone amended its application to show the transmitter output powers for each of the proposed facilities and proposed the use of duplexers which would enable the facilities to provide two-way service. On April 22, 1988, the Mobile Services Division sent a letter to Mobilfone stating that the marking and lighting data that it had submitted for its facilities at Steubenville and Bellaire was not consistent with the data it had submitted to the Federal Aviation Administration (FAA) for these structures. Mobilfone was either to amend its application to show corrected heights and coordinates for the proposed antenna structures at Steubenville and Bellaire, or amend the data for these structures filed with the FAA. On May 6, 1988, Mobilfone submitted an amendment for the Steubenville application to (1) change transmitter output power; (2) change transmitting antenna height; (3) indicate that there is no increase in the overall height of existing antenna structure; and (4) show a decrease in tip of the proposed antenna. The Bellaire application was amended to (1) correct values for the transmitting antenna structure; (2) replace the antenna structure sketch; and (3) show traffic by type of service for the existing Martins Ferry facility.

DISCUSSION

7. After careful review of the pleadings, captioned application and its amendments, we find that Mobilfone's application, as amended, provides traffic load studies for its existing facilities in compliance with Section 22.16 and Section 22.516(a)(2) of the Rules, and identifies its existing facilities within forty miles of its proposed facilities in compliance with Section 22.15(i)(2) of the Rules. We further find that Mobilfone's application, as amended, incorporates the use of duplexers in its transmission system, and therefore, demonstrates the ability to provide two-way service in compliance with Section 22.501(b) of the Rules. Therefore, we find that a grant of the application, as amended, is in the public interest, convenience and necessity.

8. Accordingly, IT IS ORDERED, that the application of Mobilfone Service, Inc., File No. 23960-CD-P/L-01-85 IS HEREBY GRANTED.

9. IT IS FURTHER ORDERED, that the petition to deny filed by James M. Pelley d/b/a Jim's 2-Way Radio IS DENIED.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or ap-

plications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Acting Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *See* October 28, 1985 amendment to the Steubenville application.

[2] It bears noting that Mobilfone no longer has any interest in the base station facilities on frequency 43.66 MHz. In its March 2, 1988 amendment, Mobilfone stated that it is currently authorized to provide service on frequency 152.24 MHz at Weirton, Wheeling, and Moundsville, West Virginia and, Barnesville Ohio. As a condition of these authorizations, Mobilfone let the construction permits for the base station facilities on frequency 43.66 MHz expire. Pelley's arguments, therefore, concerning these facilities are moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PORTLAND CELLULAR PARTNERSHIP and LEWISTON-AUBURN CELLULAR, INC. File No. 01344-CL-MP-88

For authority to combine the Cellular Geographic Service Areas of Station KNKA744 currently licensed for the Portland, Maine NECMA and Station KNKA717 currently licensed for the Lewiston-Auburn, Maine NECMA on frequency Block B in the Domestic Cellular Radio Telecommunications Service

MEMORANDUM OPINION AND ORDER

Adopted: March 3, 1989; Released: March 13, 1989

By the Acting Chief, Mobile Services Division:

1. Portland Cellular Partnership (Port Cell) and Lewiston-Auburn Cellular, Inc. (LAC) have filed a joint application requesting authority to combine the Cellular Geographic Service Areas (CGSAs) of the Portland, Maine and Lewiston-Auburn, Maine New England County Metropolitan Areas (NECMAs) on cellular frequency Block B.[1] Northeast Cellular Telephone, L.P. (Northeast) has filed comments concerning the captioned application. Port Cell and LAC have jointly filed a reply to Northeast's comments.

I. BACKGROUND

2. Northeast, an unsuccessful wireline applicant in both the Lewiston-Auburn and Portland, Maine NECMAs, filed a Petition to Deny the application of LAC, the Lewiston-Auburn wireline tentative selectee. The Petition was denied and LAC's application was granted.[2] Northeast then filed an Application for Review, which also was denied. [3] Northeast appealed the denial of its Application of Review to the U. S. Court of Appeals for the District of Columbia.[4] Northeast also filed a Petition to Deny the application of Port Cell, the Portland wireline tentative selectee. That Petition was denied and the application was granted.[5] Northeast filed an Application for Review of that Order.[6]

II. CONTENTIONS OF THE PARTIES

3. In its Comments, Northeast states that it does not object to the request to combine the Lewiston and Portland CGSAs but asks that any action granting the request to combine them be made subject to two conditions: (1) that the grant should state that it is without prejudice to Northeast's rights in either market if it becomes the licensee after the appellate process is completed and (2) that any other wireline licensee in either market would have a right to have its own system and system identification code (SID).[7] In support of its request, Northeast asserts that as long as there are administrative or judicial appeals pending, Commission grants are not final for administrative law purposes. Thus, Northeast contends that the Commission can not take any action that would deprive Northeast of its possible future rights in either market.

4. Port Cell and LAC in reply argue that the requested relief is both unjustified and unnecessary. They assert that there is no reason to believe that Northeast's appeals would be successful in either market. They add that even if Northeast should be successful, Northeast would be only a tentative selectee, and issues such as SID codes would be able to be revisited if Northeast obtained a construction permit. Moreover, they argue, Northeast is ineligible to be the wireline licensee in either Lewiston or Portland because it does not have a wireline service presence in either the Portland or Lewiston markets. They conclude that unconditional authorization of the CGSA combination does not prejudice any possible future rights that Northeast thinks it might have and, thus, the CGSAs should be authorized without conditions.

III. DISCUSSION

5. We observe that Northeastern does not object to the combining of CGSAs as proposed. Based on the record before us, we conclude that Northeast has failed to demonstrate that grant of the requested application to combine CGSAs would prejudice any future rights it may have. The Court of Appeals recently summarily affirmed the Commission's denial of Northeast's Application for Review involving LAC's application.[8] Moreover, the Commission recently denied Northeast's Application for Review concerning Port Cell's application.[9] Therefore, there are no administrative or judicial appeals pending at this time. If Northeast is successful in any subsequent appeal it might file, we will have the opportunity to address the issues raised by Northeast.

6. Insofar as the proposed combination itself is concerned, we find that it is in the public interest and that cellular customers would receive better service from such a combined system without at the same time such combination harming competition.

IV. ORDERING PARAGRAPH

7. ACCORDINGLY, IT IS ORDERED that the application of Portland Cellular Parnership and Lewiston-Auburn Cellular, Inc., File No. 01344-CL-MP-88, IS GRANTED.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Acting Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Public Notice, Rpt. No. CL-88-131, Mimeo No. 3603 (released July 1, 1988).

[2] *See* Lewiston-Auburn Cellular, Inc., 2 FCC Rcd 5546 (Com. Car. Bur. 1987).

[3] *See* Lewiston-Auburn Cellular, Inc., 3 FCC Rcd 5115 (1988).

[4] *See* paragraph 5, *infra*.

[5] *See* Portland Cellular Partnership, 2 FCC Rcd 5589 (Com. Car. Bur. 1987).

[6] *See* paragraph 5, *infra*.

[7] A SID is a unique number assigned by the Commission to each licensed cellular system. The SID number is used to determine whether a call is being made by a system's home subscriber or by a roamer.

[8] *See* Northeast Cellular Telephone Co. v. FCC, Case No. 88-1563 (D.C. Cir., decided Dec. 20, 1988) (per curiam).

[9] *See* Portland Cellular Partnership, FCC 89-59 (released Feb. 28, 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

TAMPA BAY BROADCASTING, INC. (formerly Sconnix Broadcasting Company II) File No. BPH-860110IF

For modification of license for WMXJ(FM), Pompano Beach, Florida

DAVID W. FREEMAN, SR., *et al.* File No. BPH-870327MM

For modification of license for WKLG(FM), Rock Harbor, Florida

MEMORANDUM OPINION AND ORDER

Adopted: February 15, 1989; Released: March 13, 1989

By the Commission:

1. On November 21, 1986, the Chief, Audio Services Division, acting pursuant to authority delegated by 47 C.F.R. § 0.283, denied a petition for reconsideration filed March 10, 1986 by David W. Freeman Sr., *et al.* (Freeman), of the grant of the subject application for modification of license for WMXJ(FM), Pompano Beach, Florida. Freeman filed an application for review of that denial on December 19, 1986. Thereafter, on March 27, 1987, Freeman requested modification of WKLG(FM)'s facilities at its Rock Harbor transmission site from Channel 272A to Channel 271C2, pursuant to the *Report and Order* in MM Docket 85-372, 51 Fed. Reg. 35515 (Oct. 6, 1986) (*R & O*), which application was accompanied by a request for waiver of 47 C.F.R. § 73.207 in light of the 5.3 kilometer short-spacing to WMXJ(FM)'s licensed facilities at Coral Gables. Tampa Bay Broadcasting, Inc. (Tampa Bay), licensee of WMXJ(FM), filed an informal objection to Freeman's application, a petition to delete channel and a petition to vacate modification of the WKLG(FM) license on June 5, 1987. Due to the related nature of the modification applications at issue, we will consolidate consideration of Freeman's application for review and Tampa Bay's informal objection.

2. The application for review restates arguments made in the petition for reconsideration. We have fully reviewed the Bureau's disposition of the petition for reconsideration and find no reason to disturb that ruling. Consequently, pursuant to 47 C.F.R. § 1.115(g), Freeman's application for review will be denied.[1]

3. In its informal objection against Freeman's modification application, Tampa Bay asserts that WKLG(FM)'s application for upgrade from Channel 272A to Channel 271C2 at its Rock Harbor site violates the site restriction imposed by the Commission in the *R & O* in MM Docket 85-372, 51 Fed. Reg. 35515. In so doing, Tampa Bay charges that Freeman will create a short-spacing of 5.3 kilometers to WMXJ(FM)'s Coral Gables facilities that would otherwise not exist if Freeman specified a site for WKLG(FM) complying with the restriction imposed in the *R & O*. Consequently, Tampa Bay asserts, grant of Freeman's modification application would contravene the public interest as defined in *Carroll - Harrison Broadcasting*, 62 FCC 2d 45 (1976), *recon. denied*, 67 FCC 2d 254 (1977). The 22.4 kilometer site restriction – imposed only to protect WLYF(FM) in Miami – was no longer necessary after March 2, 1987. Freeman's March 27, 1987 modification application does not create, but rather maintains, the 5.3 kilometer short-spacing to WMXJ(FM) initially created by Tampa Bay in relocating WMXJ(FM)'s transmitter to its present site. The precedent cited by Tampa Bay, which refers to the sufficiency of a request for waiver of the minimum spacing requirements where short-spacing is either created or increased, has no applicability to cases where, as here, a waiver has already been deemed in the public interest and the existing short-spacing is merely maintained.

4. Accordingly, for the reasons stated herein, IT IS ORDERED, That Freeman's application for review IS DENIED, and that Tampa Bay's informal objection IS ALSO DENIED. IT IS FURTHER ORDERED, That Tampa Bay's petition to delete channel and petition to vacate modification ARE DISMISSED AS MOOT, and that Freeman's modification of license application BPH-870327MM IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] While grant of Tampa Bay's application may have indirectly modified the WKLG(FM) license, a hearing is not required in this case pursuant to 47 U.S.C. § 316 because there is no substantial and material question of fact and grant of Tampa Bay's application is consistent with the public interest. As noted by the Bureau, no suitable sites were available to Tampa Bay in relocating the WKLG(FM) facility, the relocation preserves WKLG(FM)'s full Class C status and results in a net gain of service to 39,224 persons. Furthermore, objectionable interference is not likely to result as there is no overlap of the predicted protected and interfering contours for WKLG(FM) and WMXJ(FM) (either as licensed or as proposed in BPH-870327MM).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-61

In the Matter of

Amendment of Section 73.202(b),	RM-6521
Table of Allotments,	
FM Broadcast Stations.	
(Strasburg, Colorado)	

NOTICE OF PROPOSED RULE MAKING

Adopted: February 21, 1989; Released: March 13, 1989

By the Chief, Allocations Branch:

1. A petition for rule making has been filed on behalf of Express Communications (petitioner) proposing the allotment of FM Channel 272A to Strasburg, Colorado, as that community's first local broadcast service. Petitioner stated its intention to apply for the channel if allotted.

2. A staff engineering analysis has determined that Channel 272A can be allotted to Strasburg, Colorado, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 10.4 kilometers (6.5 miles) southeast[1] to negate a short-spacing to the site specified in the construction permit issued to Station KTRR(FM), Channel 273C2, Loveland, Colorado.[2]

3. In view of the fact that Strasburg could receive a first local broadcast service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Strasburg, Colorado	--	272A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 4, 1989,** and reply comments on or before **May 19, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

David Honig, Esq.
1800 N.W. 187th Street
Miami, FL 33056

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Reference coordinates at the restricted site are 39-39-37 and 104-15-25.

[2] Reference coordinates at the construction permit site of Station KTRR(FM) are 40-27-19 and 104-55-25.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-62

In the Matter of

Amendment of Section 73.202(b), RM-6522
Table of Allotments,
FM Broadcast Stations.
(Quincy, Shingle Springs
and Sutter Creek, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 22, 1989; Released: March 13, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed by joint petitioners Olympic Broadcasters, Inc. (OBI), licensee of Station KQNC(FM), Channel 270C2, Quincy, California, and Lobster Communications Corporation (LCC), permittee of Station KLIQ(FM), Channel 271A, Shingle Springs, California. Petitioners request the substitution of Channel 270B1 for Channel 271A at Shingle Springs and modification of the permit for Station KLIQ(FM) to specify operation on the higher powered channel. In order to accommodate the request in compliance with the Commission's minimum distance separation requirements, petitioners seek two additional changes to the FM Table of Allotments: (1) substitute Channel 271C2 for Channel 270C2 at Quincy, and modify the license of Station KQNC(FM) accordingly; and (2) substitute Channel 276A for Channel 269A at Sutter Creek, California, an allotment for which two applications are pending.[1]

2. In support of the proposal petitioners state that the requested substitution at Shingle Springs would enable Station KLIQ(FM) to provide enhanced service to its community, as well as the surrounding Sacramento Valley area. Additionally, petitioners assert that the requested Quincy substitution would permit Station KQNC to continue to operate as a Class C2 station, while the substitution of Channel 276A for Channel 269A at Sutter Creek would enable the applicants to remedy certain engineering deficiencies by relocating to sites which could bring one application into compliance with Section 73.207(b) of the Commission's Rules (File No. BPH-850711MP) and the other with Section 73.315(a) (File No. BPH-850712NF), thereby obviating the need for their present waiver requests. Petitioners note that the present site restriction on Channel 269A at Sutter Creek is 9.3 kilometers southeast,[2] whereas the requested substitution of Channel 276A would reduce the required site to an area 2.5 kilometers northeast of the community.

3. A staff engineering analysis reveals that Channel 270B1 can be substituted for Channel 271A at Shingle Springs at the site specified in the construction permit issued to Station KLIQ(FM). [3] Channel 271C2 can be substituted for Channel 270C2 at Quincy, California, at the existing site of Station KQNC(FM).[4] Further, we have determined that Channel 276A can be substituted for Channel 269A at Sutter Creek with a site restriction 2.3 kilometers (1.4 miles) north[5] of the community, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

4. Since the modification requests at Shingle Springs and Quincy conform with the provisions of Section 1.420 of the Commission's Rules, we shall propose to modify the facilities of Station KLIQ(FM) and Station KQNC(FM), respectively, without entertaining other expressions of interest.

5. We shall also serve a copy of this *Notice* on the applicants for Channel 269A at Sutter Creek. In the event this proceeding is finalized prior to the issuance of a permit for Channel 269A at Sutter Creek, the applicants may amend their applications to specify the new channel. This may be accomplished without loss of "cut-off" status since the classes of channels are equivalent. *See, Salamanca, NY and Bradford, PA*, 50 FR 26208 (1985) and *Sanibel, FL*, 50 FR 32706 (1985).

6. In view of the above, we consider it appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with regard to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Quincy, California	262A,270C2, 276A	262A,271C2, 276A
Shingle Springs, California	271A	270B1
Sutter Creek, California	269A	276A

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicants for Channel 269A at Sutter Creek, California, as follows: Sutter Creek Radio, 3357 Kimberly Road, Cameron Park, CA 95682 and Susan E. Turgetto, 454 E. Cypress Street, Covina, CA 91723.

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **May 4, 1989,** and reply comments on or before **May 19, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on counsel for the joint petitioners, as follows:

Richard A. Helmick, Esq.
Cohn and Marks
Suite 600
1333 New Hampshire Ave., NW
Washington, DC 20036-1573

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The applicants are Sutter Creek Radio (BPH-850712NF) and Susan E. Turgetto (BPH-850711MP). Although the former application was dismissed March 13, 1987, a petition for reconsideration of that action is pending.

[2] Reference coordinates for Channel 269A at Sutter Creek are 38-19-30 and 120-44-08.

[3] Coordinates at the specified site for Station KLIQ(FM) are 38-37-53 and 120-51-26.

[4] Reference coordinates at the current transmitter site of Station KQNC(FM) are 40-03-35 and 120-54-42.

[5] Coordinates at the restricted site for Channel 276A at Sutter Creek are 38-24-40 and 120-47-39.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-26

In the Matter of

Amendment of Section 73.202(b), RM-6031
Table of Allotments,
FM Broadcast Stations.
(Port Sanilac, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 23, 1989; Released: March 13, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 675 (1988), proposing the allotment of FM Channel 225A to Port Sanilac, Michigan, in response to a petition filed by D. C. Schaberg (petitioner). Comments were not received from the petitioner or any other party expressing an interest in the allotment at Port Sanilac.[1] Sanilac Broadcasting Company filed comments and a request for Dismissal of Request for Allotment.

2. Robert Armstrong, General Manager of Sanilac Broadcasting Company (Sanilac Broadcasting) requested the dismissal of the petition to add Channel 225A to Port Sanilac. Sanilac Broadcasting states its inability to serve petitioner due to the relocation of his office. Sanilac Broadcasting states that it has reason to believe petitioner may be trafficking in the construction permits and allotments and requests the Commission to investigate numerous FM proceedings in which petitioner is involved. Sanilac Broadcasting also requests that petitioner's proposal proceeding be dismissed.

3. Sanilac Broadcasting's allegations of misconduct by the petitioner have been referred to the Commission's Enforcement Division for investigation and will be treated separate from this proceeding.

4. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's general policy to refrain from making a new allotment to a community absent an expression of interest. Therefore, since there has been no such interest here, we will dismiss the petitioner's proposal.

5. Accordingly, IT IS ORDERED, That the petition of D. C. Schaberg requesting the allotment of Channel 225A at Port Sanilac, Michigan, IS HEREBY DISMISSED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The following comments and reply comments were filed after the date set in the *Notice* for filing had expired. Affidavit from David Kline, District Ranger, Mio, Michigan (4/25/88), comments and additional comments by Sanilac Broadcasting Co. (5/6/88), reply comments by petitioner (5/9/88), and further comments filed by Sanilac Broadcasting Co (5/23/88).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-200

In the Matter of

Amendment of Section 73.202(b),	RM-6124
Table of Allotments,	RM-6186
FM Broadcast Stations.	
(Dunn, Fuquay-Varina, Hope Mills,	
Topsail Beach, and Williamston,	
North Carolina)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 21, 1989; Released: March 13, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 3009 (1988), seeking comments on two mutually exclusive petitions for rule making. At the request of MECA Broadcasting, Inc. (MECA), we proposed the substitution of Channel 280C2 for Channel 280A at Fuquay-Varina, North Carolina, and the modification of its license for Station WAZZ to specify operation on the higher powered channel, as well as necessary changes at Topsail Beach and Williamston, North Carolina. At the request of Landsman-Webster Communications of North Carolina, Inc. (Landsman), we alternatively proposed the substitution of Channel 278C2 for Channel 276A at Dunn, North Carolina, the modification of its license for Station WKDS to specify the higher powered channel, and the substitution of Channel 283A for unused but applied for Channel 278A at Hope Mills, North Carolina. Both Landsman and John Gilmer Dawson III, d/b/a Genesis Communications (Genesis), an applicant for Channel 278A at Hope Mills, filed comments and reply comments. Landsman also filed a response to Genesis' reply comments.[1] MECA filed a pleading withdrawing its request for the upgrade at Fuquay-Varina, stating that it no longer desires to pursue the proposal.[2]

2. Landsman submitted comments reiterating its intention to apply for Channel 278C2, if allotted to Dunn. It also notes the withdrawal of MECA's petition, stating there is no longer any mutually exclusivity or need for a comparison of the two proposals.

3. Genesis opposes the Landsman proposal since it would be required to amend its application to specify a new transmitter site at least 7.4 kilometers east of Hope Mills. It states that its presently proposed transmitter site, which is to the northeast of Hope Mills, envisions a 1 mV/m contour encompassing 240,670 persons. It contrasts this to the 216,750 persons proposed to be served by James E. Carson, which it states is the only applicant proposing a transmitter site which will remain fully spaced on Channel 283A. Genesis contends that the reduced population coverage is due to the transmitter's location to the southeast of Hope Mills and away from the nearby larger population centers of Fayetteville and Laurinburg, North Carolina, which are north and northwest of Hope Mills. It states that Fayetteville is located less than ten miles north of Hope Mills and thus any station will be operating on the fringe of the larger market. It argues that the initial handicap of the Class A station competing with the Fayetteville and Laurinburg Class C and C1 stations will be exacerbated if it is unable to cover the entire market. According to Genesis, upgrading the Dunn station from a Class A to Class C2 channel does not warrant the increased threat to the economic base of the Hope Mills station and thus its ability to serve the needs of its community of license and its service area as a whole.

4. In reply, Landsman disputes Genesis' claim that the substitution of channels at Hope Mills would harm the station's economic base and its ability to cover the entire market. It states that the claims are speculative, and that they have already been taken into account and rejected by the issuance of the *Notice*. Landsman points out that Genesis is only one of four competing applicants for the Hope Mills channel and that it has no assurance that it will ultimately be granted the construction permit. Therefore, it claims that it is "sheer speculation" for Genesis to claim loss of population, coverage, economic opportunity, or anything else. Further, it states that no applicant for Hope Mills, with the exception of Genesis, will be required to change transmitter site based on the sites presently specified in their amended applications. Genesis' site, it argues, can be considered as nothing more than a preference, which is not binding on the Commission, citing *Freedom and Morgan Hill, California*, 62 R.R. 2d 1057 (1987). Landsman submits that the upgrading of Station WDKS will enable it to provide service to 425,661 persons in lieu of its present 81,728 persons. It goes on to state that 319,933 persons would still receive new service even if the possible loss of 24,000 persons due to use of a different Genesis site is taken into account. Further, it states that Genesis does not claim that those losing service reside in either an unserved or underserved area. Landsman argues that the public benefit accruing from this increase in service far outweighs the protection of what is only a preferred site at Hope Mills. As to the economic viability of a Hope Mills station, it contends that "the Commission is no insurer of the economic success of a broadcast enterprise; economic viability is not a factor to be taken into account in FM allotments." In support, it cites *Revision of FM Assignment Policies and Procedures*, where the Commission stated that "[t]he rule making process is designed to further the 307(b) objectives to provide a fair, efficient and equitable distribution of radio service. This process is not a suitable one for consideration of the economic questions that underlie the *Carroll* issue." 90 FCC 2d 88, 99, 51 RR 2d 807, 815 (1982). Landsman goes on to note that the Commission subsequently repealed the *Carroll* doctrine by *Report and Order* in MM Docket 87-69, 3 FCC Rcd 638 (1988).

5. In its reply comments, Genesis reiterates its arguments concerning the undesirable effect of relocating its transmitter site and submits a counterproposal requesting instead that Channel 294A be allotted to Hope Mills by substituting Channel 283A for Channel 295A at St. Pauls, North Carolina. In support, it states that while it would still be required to relocate its transmitter, it would only have to move about 1 kilometer south of its presently

proposed site rather than the 7 kilometers required by the use of Channel 283A. Genesis claims that this relocation would enable it to provide virtually the identical coverage now proposed in its application. In addition, Genesis states that the area for a St. Pauls transmitter would be enlarged, thus leading Genesis to believe that any fully spaced site proposed by a Channel 295A applicant for St. Pauls could also be used for Channel 283A. Genesis is aware that the presentation of a counterproposal in reply comments contravenes Section 1.420(d) of the Commission's Rules, which states that counterproposals shall be advanced in initial comments only. However, it states that it was unable to advance the proposal in initial comments since the filing window had not yet closed for the St. Pauls channel, which was allotted in MM Docket 84-231.[3] Finally, Genesis argues that it would be inefficient to require three of the four applicants for Channel 278A at Hope Mills amend their applications to specify new sites only to have it refile the counterproposal as a new petition for rule making. Therefore, it requests that we waive the requirements of Section 1.420(b) and adopt its counterproposal at this time, thus causing no delay to the upgrading of Station WKDS at Dunn. At the very least, it requests the issuance of a Further Notice, thus negating the need for further engineering amendments by the Hope Mills applicants.

6. We believe the public interest would be served by substituting Channel 278C2 for Channel 276A at Dunn, North Carolina, and the substitution of Channel 283A for Channel 278A at Hope Mills, North Carolina, since it could enable Station WKDS to increase its service area. As requested, we shall also modify Landsman's license for Station WKDS to specify operation on Channel 278C2. We find that Genesis has not shown that its applied-for site can be considered as anything more than a mere preference. While Genesis may not be able to provide the same level of service to the larger community of Fayetteville, it has presented no evidence that either it or any of the other applicants will be unable to provide the requisite level of service to its community of license. Hope Mills, if required to change transmitter site to accommodate Channel 278C2 at Dunn. Genesis also has not shown that the service it could provide from its preferred site would better serve the public interest than the combined allotment of Channel 278C2 to Dunn and Channel 283A at Hope Mills. As to economic impact, Landsman has correctly pointed out that the Commission has both refused to consider *Carroll* issues in allotment proceedings, and repealed the *Carroll* doctrine. Thus, the economic injury claims presented by Genesis are not properly before the Commission. We also find that Genesis' counterproposal cannot be considered herein. Section 1.420(d) of the Rules stipulates that counterproposals will only be considered if advanced in initial comments. The fact that, had Genesis advanced its counterproposal earlier, the counterproposal would have violated our since overturned policy prohibiting substitutions for Docket 84-231 channels, is not a sufficiently compelling reason to waive the Commission's Rules with respect to the consideration of counterproposals. Genesis was free to submit its request in a timely manner and then challenge our policy. Moreover, were we to now adopt its proposal, our action might well be beyond the scope of the *Notice* in this proceeding because potentially affected third parties were advised in the *Notice* of our procedure for considering counterproposals. We also can find no benefit in delaying the upgrade at Dunn by issuing a *Further Notice* to explore the proposed substitution at St. Pauls. We believe that the only applicant at this time which will be required to change its transmitter site is Genesis and, as stated above, we have found that it has not provided any showing that use of its preferred site would better serve the public interest than would the upgrading of Station WKDS as proposed. In fact, the three other applicants have specified sites which are fully spaced on Channel 283A. Moreover, Genesis concedes that it would be required to relocate its transmitter site even if we were to adopt its proposed substitution at St. Pauls. Therefore, its proposal for St. Pauls would require, at the least, the same number of applicants to find new transmitter sites, and might, in fact, require a greater number to find new transmitter sites, thereby creating greater disruption to the application process. Genesis may, however, resubmit its request as a separate petition for rule making.

7. Channel 278C2 can be allotted to Dunn in compliance with the Commission's minimum distance separation requirements with a site restriction of 29.3 kilometers (18.2 miles) south to avoid a short-spacing to the construction permit of Station WKKE, Channel 279C1, Williamston, North Carolina, and to Station WAZZ, Channel 280A, Fuquay-Varina. Channel 283A can be allotted to Hope Mills with a site restriction of 7.4 kilometers (4.6 miles) east to avoid a short-spacing to Stations WEZC, Channel 284C, Charlotte, North Carolina, and Station WDCG, Channel 286C, Durham, North Carolina. In addition, Channel 283A can be used at the sites specified in the applications of James E. Carson (ARN-870819MJ), Winfas of Fayetteville, a Limited Partnership (ARN-870819MF), and Hope Mills Broadcasting Partnership (ARN-870819MP).[4]

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 27, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Dunn, North Carolina	278C2
Hope Mills, North Carolina	283A

9. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Landsman-Webster Communications of North Carolina, Inc. for Station WKDS, Dunn, North Carolina, IS MODIFIED to specify operation on Channel 278C2, in lieu of Channel 276A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Report and Order* BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following applicants for Channel 278A at Hope Mills, North Carolina:

Winfas of Fayetteville
A Limited Partnership
P.O. Box 59
Burlington, NC 27216

James E. Carson
1866 Geiberger Drive
Fayetteville, NC 28303
(ARN-870819MJ)

Hope Mills
Broadcasting
Partnership
647 Edgehill Raod
Fayetteville, NC 28304
(ARN-870819MP)

Genesis
Communications
1525 Morgantown Road
Fayetteville, NC 28305
(ARN-870819ML)

11. IT IS FURTHER ORDERED, That the request of MECA Broadcasting, Inc. to substitute Channel 280C2 for Channel 280A at Fuquay-Varina, North Carolina, and related changes at Topsail Beach and Williamston, North Carolina, IS DISMISSED.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period. Landsman's response, which was accompanied by a request for its acceptance, states that the reply comments of Genesis contained new matters which no party had an opportunity to comment on, namely a counterproposal to the allotments proposed in the *Notice*. Based on the action taken herein, we do not believe the public interest would be served by considering Landsman's unauthorized pleading.

[2] Based on the withdrawal of MECA, the comments of Landsman and Genesis which relate to the Fuquay-Varina upgrade need not be considered.

[3] The Commission has stated that it will not consider the substitution of channels allotted in MM Docket 84-231 until after the filing window has closed absent a showing of compelling need or Commission error. The Commission has also stated that the upgrading of an existing station to a higher class does not constitute a showing of compelling need. *See, Memorandum Opinion and Order*, 59 R.R. 2d 679, 680 (1985). Once the filing window has closed, however, the Commission will accept proposals for such substitutions if the alternate channel can be used at all of the sites specified in the pending applications. That policy was recently overturned by the Court of Appeals. *See Reeder v. FCC*, Case No. 86-1045 (slip op. January 24, 1989). Accordingly, we have not applied that policy in this proceeding.

[4] The coordinates for Channel 278C2 at Dunn are North Latitude 35-02-45 and West Longitude 78-36-30. The coordinates for Channel 283A at Hope Mills are North Latitude 34-57-30 and West Longitude 78-52-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-63

In the Matter of

Amendment of Section 73.202(b), RM-6583
Table of Allotments,
FM Broadcast Stations.
(Chubbuck, Idaho)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 21, 1989; Released: March 13, 1989

By the Chief, Allocations Branch:

1. Chubbuck Community Broadcasters, Inc. (petitioner) licensee of KRCD, Channel 252A, Chubbuck, Idaho has filed a petition for rule making seeking the substitution of FM Channel 253C2 for Channel 252A and modification of its license to specify the higher powered channel. Petitioner states that it will apply for the channel if allotted.

2. A staff engineering analysis confirms that Channel 253C2 can be substituted for Channel 252A at the petitioners present transmitter site[1] in compliance with the minimum distance separation requirements of the Commission's Rules.

3. In consideration of the above, we propose to substitute Channel 253C2 for Channel 252A at Chubbuck, Idaho. As requested, we also propose to modify the Class A license of Station KRCD-FM to specify operation on Channel 253C2. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 253C2 at Chubbuck or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such interested parties.

4. We believe the public interest would be served by proposing the substitution of Channel 253C2 for Channel 252A at Chubbuck since it could provide Station KRCD-FM with an expanded coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Chubbuck, Idaho	252A	253C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing i rest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 4, 1989,** and reply comments on or before **May 19, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Thomas W. Mathis
Vice President
Chubbuck Community Broadcasters, Inc.
2661 Clearwater Street
Pocatello, Idaho 83201

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Chubbuck, Channel 253C2 are 42-55-15 and 112-20-44.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-64

In the Matter of

Amendment of Section 73.202(b), RM-6584
Table of Allotments,
FM Broadcast Stations.
(Island Park, Idaho)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 21, 1989; Released: March 13, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Island Broadcasters (petitioner) seeking the allotment of FM Channel 293C to Island Park, Idaho as that community's first local FM service. Petitioner stated its intention to apply for the channel if allotted.

2. A staff engineering analysis has determined that Channel 293C can be allotted to Island Park, Idaho, in compliance with the minimum distance separation requirements of the Commission's Rules.[1]

3. In view of the fact that Island Park could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Island Park, Idaho	–	293C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 4, 1989,** and reply comments on or before **May 19, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Howard McDonald
Technical Director
Island Broadcasters
P.O. Box 710
Ennis, MT 59729
(petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Island Park are 44-23-30 and 111-18-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Operating Companies

Revisions to Tariff F.C.C. No. 1 — Transmittal No. 185

Billing of Jointly Provided
Feature Group A Access Service

ERRATUM

Released: March 14, 1989

1. In the Order released by the Common Carrier Bureau in the above-captioned proceeding on January 13, 1989, DA 89-29, two lines were inadvertently deleted from the second paragraph. The second paragraph should read:

> "2. Under BellSouth's current tariff, if FGA access service is jointly provided with another local exchange carrier (LEC), the carrier in whose territory the first point of switching is located accepts the order, arranges the service, and bills the customer in accordance with its own tariff. The currently proposed revisions would add an exception to this meet point billing rule. Specifically, when BellSouth and one or more other LECs jointly provide the transport facility between the first point of switching and the customer's point of termination, these revisions would enable each of the LECs involved to use its own tariff to bill the customer for each LEC's portion of such facility. Such separate billing will occur if each affected LEC agrees to that arrangement."

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NYNEX Petition for Waiver of Section 36.380 of the Commission's Rules — AAD 8-1931

MEMORANDUM OPINION AND ORDER

Adopted: March 3, 1989; Released: March 14, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On October 14, 1988, New England Telephone and Telegraph Company and New York Telephone Company (NYNEX) filed a petition for waiver of Section 36.380 of the Commission's Rules[1] which reinstates, effective April 1, 1989, the former Part 67 separations procedures for the Other Billing and Collecting Expense subcategory of Revenue Accounting Expenses on an interim basis pending the adoption of a permanent rule.[2] The Other Billing and Collecting Expense subcategory includes the salary expenses, certain data processing expenses, general accounting administrative expenses, and miscellaneous expenses associated with the preparation of customer bills other than access charge bills, this subcategory also includes Revenue Accounting Expenses not included in other categories. [3] The Commission adopted new separations procedures for Revenue Accounting Expenses including Other Billing and Collecting Expense in the *Separations Report and Order*.[4] These procedures became effective January 1, 1988. On reconsideration, the Commission decided to reinstate the former Part 67 separations procedures pending the outcome of further inquiry by the Federal-State Joint Board in CC Docket No. 80-286.[5] NYNEX requests that it be allowed to use the Part 36 rules pending the outcome of a decision by the Commission regarding permanent rules and requests that we grant this waiver to similarly situated carriers. On November 4, 1988, the Commission invited interested parties to comment on NYNEX's petition.[6] For the reasons set forth below, we deny NYNEX's waiver request.

II. BACKGROUND

2. Under former Part 67 of the Commission's rules, the Other Billing and Collecting Processing Expense subcategory of Revenue Accounting Expenses was segregated on the basis of the relative number of users in specified service categories.[7] On May 1, 1987, the Commission adopted the Docket 80-286 Joint Board's recommendation that the separations procedures applicable to Revenue Accounting Expenses be revised to reflect AT&T's intention to discontinue its use of a portion of the local exchange carriers' (LECs') billing and collecting services and instead to begin performing its own billing and collecting functions. Under the new Part 36 procedures, the LECs allocated the Other Billing and Collecting Expense subcategory on the basis of a formula that reflected a count of the number of users of various local and toll services.[8] LECs further adjusted this allocation factor to reflect the change in the percentage of users since 1984 for which the LECs perform interstate billing and collecting. Thus, LECs compared their user count for 1984 with their count for the current year, which was the preceding calendar year. The rules also established a maximum 33 percent and a minimum 5 percent interstate allocation for the Other Billing and Collecting Expense subcategory.[9] Under the former Part 67 rules, End User Common Line Access Charge Billing Expense was a subcategory separate from Other Billing and Collecting Expense. The Part 36 procedures eliminated this subcategory and combined those expenses with the Other Billing and Collecting Expense subcategory. On reconsideration, the Commission included End User Common Line Access Charge Billing Expense as a subcategory of Other Billing and Collecting Expense.[10]

3. The *Order on Reconsideration*, stated that the reduction in the amount of billing and collecting the LECs perform on behalf of the interexchange carriers (ICs) should be reflected in reduced interstate assignments. The Commission found, however, that the Part 36 procedures had proved problematic in application. That order further stated that the formula comparing 1984 user counts to current user counts had caused unintended and anomalous results.[11] The Commission noted that the Part 36 allocation formula was difficult to administer and that because the amount of billing and collecting services AT&T had begun performing was less than originally expected, the allocation formula might no longer be an accurate measure. The Commission invited comments and asked the Docket 80-286 Joint Board to analyze proposals and submit a recommendation. Pending resolution of that inquiry, the Commission reinstated the former Part 67 Other Billing and Collecting Expense procedures on an interim basis.

III. THE PETITION AND COMMENTS

4. NYNEX requests that the Commission waive the interim Part 67 separations procedures for the Other Billing and Collecting Expense subcategory and allow it to use the Part 36 procedures pending the adoption of a permanent rule. NYNEX requests that we also grant similarly situated carriers waivers. NYNEX submits that a waiver would relieve carriers and the Commission of the administrative burden of first implementing temporary separations procedures and then switching to new procedures when a permanent rule is adopted. NYNEX argues that the interim procedures are overly complicated because those procedures require multiple service user counts, allocation factors and studies, and procedures for apportioning End User Common Line Access Charge Billing Expense. NYNEX maintains that the interim procedures do not reflect cost-causation principles because those procedures require the allocation of substantial costs based on the relative number of messages in contravention of the Commission's observation in the *Order on Reconsideration* that the Other Billing and Collecting Expense subcategory involves a large group of relatively fixed costs that are not sensitive to the volume of messages or the amount of revenues the LECs collect.[12] NYNEX states that it would be burdensome to prepare separations

studies based on the interim procedures for inclusion in its annual access filing. NYNEX notes that, in its comments filed in response to the *Order on Reconsideration*, it and other parties proposed a simple separations procedure for the Other Billing and Collecting Expense subcategory which is based on currently available jurisdictional user counts. NYNEX proposes that the Commission move expeditiously to make these suggested modifications of the Part 36 Other Billing and Collecting Expense procedures instead of applying the interim allocation procedures. NYNEX submits that the interim procedures would cause a $12.4 million shift in revenue requirement to the state jurisdiction for its companies and argues that a grant of its waiver would relieve its ratepayers from this added upward pressure on rates and would prevent unreasonable rate fluctuations.

5. NYDPS, SWB, and Bell Atlantic support NYNEX's petition. Those carriers believe that the interim rule should not be implemented. NYDPS states that reinstatement of Part 67 procedures would cause an $8 million shift in revenue requirement to the state jurisdiction in New York Telephone's study area. NYDPS maintains that the interim procedures do not address the underlying problems in the Other Billing and Collecting Expense subcategory. NYDPS finds no justification for returning, even for an interim period, to the old procedures which the Commission found to result in the improper allocation of local exchange company costs. SWB believes the Commission should grant NYNEX's petition to avoid repeated disruption of ongoing separations data, to avoid wasteful efforts by carriers each month to develop and gather actual data to implement the interim allocation factor, and to avoid an unwarranted $12.8 million shift in revenue requirement to the state jurisdiction for its companies. SWB submits that because the allocation ratio will revert to the 1987 level, regardless of the level that will result under permanent procedures, the revenue requirement that would result under the interim rules would be unwarranted, confusing, and potentially misleading to carriers, their customers, and regulators. SWB agrees with NYNEX's assertion that the allocation of Other Billing and Collecting Expense on the basis of messages, as is required under the Part 67 procedures, would not reflect cost-causation principles as set forth by the Commission in the *Order on Reconsideration*. SWB also asserts that, although it has already implemented the interim Part 67 procedures in its 1989 annual access tariff filing, we should grant the NYNEX petition, not for the purpose of that filing, but to avoid the repeated disruption of the ongoing separation of actual data. SWB submits that, by not implementing the Part 67 procedures, carriers can avoid the wasteful efforts required each month to develop and gather actual data to implement an interim allocation factor.

6. Bell Atlantic stated that none of the comments filed in response to the *Order on Reconsideration*, support the interim rule as written and most do not even support a modified version of the interim rule because the interim rule does not reflect cost-causation principles. Bell Atlantic states that the consensus of the parties is that the Part 36 rule, with some modifications, should be adopted on a permanent basis. Bell Atlantic maintains that the Part 36 rule reflects cost-causation principles because that rule separates Other Billing and Collecting Expense on the basis of the ratio of interstate users to total users and can be easily modified to prevent unintended and anomalous results. Bell Atlantic advocates the adoption of that Part 36 rule until the necessary modifications can be made. Bell Atlantic states that first implementing interim procedures and then changing to a permanent rule would be inefficient and will cause unnecessary changes in jurisdictional revenue requirements and tariff rates.

7. GTE and Pacific do not comment on whether we should grant NYNEX's waiver but argue that the waiver, if granted, should apply only to NYNEX and any other carriers that specifically request a waiver. Pacific does not disagree with NYNEX's observation that the interim procedures are burdensome and overly complicated but states that it would oppose the mandatory imposition of the waiver on all LECs. Pacific submits that use of the Part 36 procedures in developing its 1988 interstate revenue requirement increased the interstate allocation of Other Billing and Collecting Expense from 10 percent to 29 percent. Pacific submits that it expects the continuation of this increased level of allocation if it uses the Part 36 procedures to develop its 1989 interstate revenue requirement. Pacific claims that the interim procedures produce results that are more consistent with its costs. Pacific maintains that, in its jurisdiction, the use of the Part 36 procedures produces the unintended and anomalous results that caused the Commission to reconsider that rule. Pacific states that, in response to the *Order on Reconsideration*, it proposed an approach to the allocation of these expenses, an approach which it continues to support.[13]

8. AT&T opposes NYNEX's petition, stating that the Commission should leave the interim rule in place and move expeditiously to adopt permanent rules. AT&T claims that the circumstances set forth in NYNEX's petition do not justify the grant of a waiver because the interim rule is fundamentally sound. AT&T states that as it provides more of its own billing and collecting services under the interim rule, the portion of the LECs' Revenue Accounting Expenses assigned to the interstate jurisdiction will decrease and state revenue requirements will increase, reflecting the increasing cost of the LECs' own state service. AT&T submits that the record in Docket No. 80-286 showed convincingly that the Part 36 procedures are neither cost-based nor reasonable to implement. AT&T states that the interim rule is actually less burdensome to implement than the Part 36 rules and adds that virtually every party seeking reconsideration, including NYNEX, supported simplification of the complex formula for determining toll users contained in the Part 36 rules. AT&T states that NYNEX's claim that it could not implement the interim procedures in time for its annual access filing does not justify a waiver. AT&T states that, contrary to NYNEX's claims, the separations studies and allocation procedures needed to implement the interim procedures do not present either unique or extraordinary circumstances warranting a waiver.

9. The NYNEX reply estimated that the revenue requirement shift resulting from the use of the interim rule could be as much as $20 million annually. NYNEX submits that the task of switching to the interim procedures is burdensome but not impossible and states that its 1989 access filing uses projections based on the interim rule. NYNEX maintains that, until a permanent rule is adopted, the LECs will have to change from the Part 36 Other Billing and Collecting Expense procedures to the interim Part 67 rule in developing the ongoing, monthly separations data and it is this burden that NYNEX claims justifies a waiver of the interim rule. NYNEX submits

that, if the Commission grants its waiver, the access tariffs can be easily adjusted to accommodate the separations change. NYNEX states that the interim rule is not sound and that the Commission originally discarded Part 67 allocation procedures because those procedures did not reflect cost-causation principles and resulted in improper cost allocations. NYNEX submits that no party supports the interim rule in its present form.

10. The Bell Atlantic reply states that because the interim rule will not be implemented until April 1, 1989, the return to the Part 36 procedures, which are currently in effect, would not be burdensome. Bell Atlantic maintains that the interim rule is not fundamentally sound and even AT&T agrees it should be amended. Bell Atlantic submits that, if the interim rule is amended as AT&T suggests, it will still result in improper allocations because it uses messages to allocate costs. Bell Atlantic maintains that the permanent rule should not be based on any variation of the interim rule and that most parties in the Docket No. 80-286 proceeding agree that it should be based on the Part 36 rule. Bell Atlantic submits the Part 36 rule should be used pending its amendment. Therefore, Bell Atlantic agrees with SWB that this will avoid both the repeated disruption of the ongoing separation of actual data and an unwarranted short term shift in revenue requirement to the interstate jurisdiction.

IV. DISCUSSION

11. We deny NYNEX's petition. The *Order on Reconsideration*, reinstated the former Part 67 separations procedures for Other Billing and Collecting Expense because the record demonstrated that the Part 36 procedures were difficult to administer, and in certain cases, did not reduce interstate allocations as originally intended. Several petitions for reconsideration, including one filed by NYNEX, proposed that the Commission reinstate the former Part 67 procedures for Other Billing and Collecting Expense.[14] NYNEX now seeks relief, for itself and other carriers, from the very procedures it supported on reconsideration. We denied a similar waiver request by Cincinnati Bell Telephone Company in the 1989 access tariff filing proceeding.[15] NYNEX has shown no persuasive reason or unique or extraordinary circumstances in its case that would warrant a waiver of the interim procedures set forth in the *Order on Reconsideration*. NYNEX's claim that implementation of the Part 67 procedures would be unduly burdensome is totally unfounded. In fact, the Commission's conclusion on reconsideration that the Part 36 procedures were themselves difficult to administer was based on the LECs' assertions.[16] Both the Part 67 and the Part 36 procedures require the carriers to compile essentially the same data; these rules differ merely in the formula that the carriers apply to that data. The Part 36 formula, which NYNEX advocates, is more complex than the Part 67 formula because it requires the comparison of user count data for two different years (1984 and the current year). The Part 67 formula, which uses a user count for one year only, is actually simpler than the Part 36 procedures. We therefore find NYNEX's claim that it should be allowed to use the Part 36 rules because the interim Part 67 procedures are "overly complicated"[17] to be entirely without merit.

12. Moreover, in its petition for reconsideration of the Part 36 rules, NYNEX supported the petition of the United States Telephone Association (USTA), which stated that the Part 36 procedures would "inject unnecessary complexity into the separations manual and lead to irrational allocations."[18] For those reasons, USTA and NYNEX supported the implementation of the Part 67 procedures. NYNEX is now claiming that it is the Part 67 procedures that are overly complex and do not reflect cost-causation principles. In seeking reconsideration, USTA further stated that the Part 67 rules more accurately reflect the volume of revenue accounting transactions than does a count of interstate and state users as is required under the Part 36 rules. NYNEX supported these arguments in its petition for reconsideration and stated that the Part 36 rule "creates an added level of complexity and administrative burdens."[19] In light of these contradictory arguments by NYNEX, we find its petition for waiver unpersuasive. Moreover, a waiver request is not appropriate in these circumstances because a decision to grant a waiver would effectively reverse the Commission's decision that the Part 36 procedures produce anomalous results. The Commission determined that the Part 67 procedures should be in effect on an interim basis until it adopts permanent procedures. If we were to grant NYNEX's waiver, we would contravene that determination. Therefore, we deny NYNEX's request for waiver.

V. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED, That the New England Telephone and Telegraph Company and New York Telephone Company petition for waiver of Section 36.380 of the Commission's Rules and Regulations IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 3 FCC Rcd 5518 (1988) (*Order on Reconsideration*).

[2] In an order released October 24, 1988, the Chief of the Common Carrier Bureau postponed the effective date of the interim rule from January 1, 1989, until April 1, 1989, to coincide with the 1989 access tariff filing. MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 3 FCC Rcd 6465 (1988).

[3] The Other Billing and Collecting Expense subcategory includes the expenses incurred in the preparation of monthly bills, initial and final bills, the application of service orders to billing records (establishing, changing, or discontinuing customers' accounts), station statistical work, controlling record work, and the preparation of revenue reports. *See Revenue Accounting Expense Separations Procedures*, 53 Fed. Reg. 33,010, 33,011 (August 29, 1988) (to be codified at 47 C.F.R. §36.380).

[4] Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Joint Board, 2 FCC Rcd 2639 (1987). The former Part 67 Separations Manual was replaced by the new Part 36 Separations Manual effective January 1, 1988.

[5] In this Order, to avoid confusion, we describe the procedures the Commission adopted in May 1987 as the Part 36 procedures and the interim procedures adopted on reconsideration as the Part 67 procedures.

[6] The following parties filed comments: American Telephone and Telegraph Company (AT&T), the Bell Atlantic Telephone Companies (Bell Atlantic), New York State Department of Public Service (NYDPS), GTE Service Corporation (GTE), Southwestern Bell Telephone Company (SWB). The following parties filed replies: NYNEX, Bell Atlantic and Pacific Bell (Pacific). Although the Bell Atlantic and Pacific replies are unauthorized pleadings, *See* 47 C.F.R. § 1.45(b), we will treat them as comments.

[7] These categories are: message toll and telegram (including semi-public in cases in which tolls are not itemized on the bill), TWX, exchange (including semi-public), directory advertising, and private line. In determining the number of users, an individual customer may be counted both as an interstate or state message toll service user and as an exchange service user. *Revenue Accounting Expense Separations Procedures*, 53 Fed. Reg. 33,010, 33,011 (August 29, 1988) (to be codified at 47 C.F.R. § 36.380(b)). *See also* former Section 67.384(b) of the Commission's Rules.

[8] The rules required carriers to determine the relative number of users of the following services: interstate message toll, state message toll, interstate private line, state private line, exchange, directory advertising, interstate TWX, and state TWX. *See* 47 C.F.R. § 36.380(b).

[9] The Part 36 rules required that the LECs establish an allocation factor for the Other Billing and Collecting Expense subcategory by: (1) establishing a composite of relative current users and a base of relative 1984 users; (2) multiplying the composite user factor by .33; (3) subtracting the result from 1; and, (c) multiplying the result by .05. [(composite by .33) + (1 -composite x .05)] The resulting interstate allocation was subject to a maximum of 33 percent and a minimum of 5 percent.

[10] *See Revenue Accounting Expense Separations Procedures*, 53 Fed. Reg. 33,010, 33,011 (August 29,1988) (to be codified at 47 C.F.R. § 36.380).

[11] *See Order on Reconsideration*, 3 FCC Rcd at 5523.

[12] *See Order on Reconsideration*, 3 FCC Rcd at 5523.

[13] In Comments filed September 16, 1988, and Reply Comments filed October 6, 1988, Pacific proposed to modify Part 36 to eliminate the formula in Section 36.380(b)(1)(iii) that is used to adjust the allocation of the Other Billing and Collecting Expense subcategory to the interstate jurisdiction. Under Pacific's proposal, the total unseparated Other Billing and Collecting Expense would be allocated on the basis of a user count, with a minimum 5 percent interstate allocation to reflect the subscriber line charge. Pacific Comments, at 2-3; Pacific Reply Comments at 2.

[14] *Order on Reconsideration* 2 FCC Rcd at 5522.

[15] Annual 1989 Access Tariff Filings, Petition for Waiver and Petition for Reconsideration, DA 88-1812, released December 2, 1988, at para. 54.

[16] *Order on Reconsideration*, 3 FCC Rcd at 5523.

[17] Petition for Waiver of NYNEX at 3.

[18] Petition for Reconsideration of USTA, filed June 5, 1987 in CC Docket Nos. 78-72, 80-286 and 86-297, at 7.

[19] Petition for Reconsideration of NYNEX, filed June 8, 1987, in CC Docket Nos. 78-72, 80-286 and 86-297, at 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Mountain States Telephone and
Telegraph Company, Northwestern
Bell Telephone Company, and Pacific
Northwest Bell Telephone Company

Petition for Contingent Waiver

MEMORANDUM OPINION AND ORDER

Adopted: March 7, 1989; Released: March 7, 1989

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Pursuant to a contingent waiver granted by the Common Carrier Bureau, US West has filed access rates that target the Local Transport and Local Switching access rate elements at the authorized rate of return of 12.0 percent on a combined basis.[1] We granted that contingent waiver to facilitate the tariff filing, but we did not assess the merits of the proposal to use a combined revenue requirement to price these access elements. The US West petition for waiver asserted that the application of certain of the Commission's Rules, in conjunction with changes in Special Access demand, was causing significant revenue requirement shifts to the Local Transport rate element and away from Special Access while other changes have caused significant decreases in the Local Switching rate element revenue requirement. US West contended that these revenue requirement shifts had created an unstable rate environment that has given interexchange carriers (ICs) an "artificial incentive" to reconfigure their networks. US West projected that it would propose a rate increase of approximately 3 percent for the combined switched access rate elements. *See US West Waiver Order* at paras. 2-3.

2. AT&T opposed US West's petition, contending that this waiver request raised significant policy considerations which the Commission has determined should be examined in a Rule Making proceeding. AT&T also argued that the Local Switching and Local Transport functions are distinct and that the two rate elements have different underlying cost characteristics. AT&T concluded that the proposed merger of these distinct costs into one rate element would not reflect the individual costs of each function. *Id.* at para. 5.

II. PLEADINGS

3. AT&T has filed a petition to suspend and investigate the proposed rates filed by US West. AT&T argues that the proposed rates raise significant questions of unlawfulness because they are not cost-based and because US West has not provided sufficient justification for departing from the Commission's Rules requiring that the Local Switching and Local Transport rates be individually set to recover their respective costs. AT&T Petition at 1-2.

4. AT&T notes that the Commission has consistently held that access rates should be based on costs and that cost recovery should be linked to cost causation wherever feasible. AT&T also notes that this Bureau has in the past stressed the importance of relating transport rates to the underlying costs of providing that service. *Id.* at 4.[2] AT&T concludes that the rates filed by US West pursuant to the contingent waiver are not cost-based because those rates recover the costs of Local Switching and Local Transport on a combined basis despite the fact that these two rate elements represent distinct functions. AT&T notes that the rates calculated pursuant to the contingent waiver shift approximately $80 million from Local Transport to Local Switching (as compared to the informational rates developed by US West in conformance with the Rules) and that this fact illustrates the very different underlying cost characteristics of the two rate elements. *Id.* at 5.

5. AT&T also disputes US West's contention that a waiver is necessary in order to avoid rate shock and to avoid giving customers "artificial incentives" to reconfigure their networks. On the contrary, AT&T contends, US West's proposed rates could create such incentives by artificially lowering the rates for transport. Network planning decisions taken in response to this filing could be rendered inefficient if US West later moves to cost-based access rates.

6. AT&T also discounts US West's speculation about rate shock. AT&T observes that virtually all customers purchase both Local Switching and Local Transport from the same company and that any increase in one rate element would be offset by the decrease in the other. [3] Finally, AT&T states that the Commission has found that the effect of proposals further to combine access rate elements or the costs underlying them for purposes of targeting their rate of return has not yet been determined and might not be justified. Therefore, the Commission directed that any such requests for aggregation be presented in a petition for Rule Making.[4]

7. US West responds that AT&T has misinterpreted Parts 36 and 69 of the Commission's Rules. According to US West, a correct reading of the rules demonstrates that its requested waiver is justified and that its rates are cost-based. US West opens its discussion by stating that "AT&T effectively argues that the present Separations and Part 69 cost allocation rules represent the only valid measure of cost-based rates." US West Opposition at 2. US West disagrees and asserts that "[t]hese rules . . . are not precise . . . [and] they can and do change over time to reflect the underlying economics of the services and to accomplish the Commission's public policy objectives." *Id.* US West also contends that "[s]ince there are many possible ways to allocate costs and overheads, there are no right or wrong allocators, only reasonable or unreasonable allocators." US West argues that the "allocation factor" it has chosen is reasonable because it will promote an important public policy objective, the maximization of usage of the public switched network. *Id.*

8. US West reiterates its contention that the Commission's Rules have somehow caused significant and surprising shifts in revenue requirements from previous trends. Although US West's opposition does not provide any elaboration of this generalized assertion, its Description and Justification (D&J) asserts that these shifts, "as best as

can be determined," are the result of various changes in the rules and in the marketplace. *See* US West Tr. No. 219, D&J, vol. 1, p. 2-9. US West then proceeds to list a number of factors which, it asserts, are responsible for the "dramatic" revenue requirement shifts that it says it expects to experience in 1989 as compared to actual results for 1988.

9. US West asserts that AT&T's analysis of Local Switching and Local Transport costs and their relationship to cost-based rates is flawed. According to US West, the costs for the various access elements are not distinct and precise as AT&T argues. Moreover, US West states that the Local Switching and Local Transport rates would continue to be representative of their underlying cost characteristics. This occurs because the rate development process uses the current rates and their relationships as the allocators of the combined revenue requirement. These current rates parallel the relationship of the underlying cost characteristics.

US West Opposition at 6-7. After further discussion, US West presents its conclusion that

> rates filed under terms of the instant waiver application are cost based in that they reflect the underlying unit cost relationships and recover the aggregate revenue requirement for Local Switching and Local Transport. . . . When rates are affected by Part 36 and Part 69 Rule changes . . . it cannot be said that the resulting rates are more or less reflective of their underlying economic costs. It can only be stated that they are reflective of the separated costs as defined by the Part 36 and Part 69 Rules.

Id. at 9.

10. US West also seeks to justify its waiver request by noting that switching and transport costs are not incurred independently of one another. Finally, US West concurs in AT&T's observation that switched access elements are routinely purchased in tandem. US West concludes that combining the Local Transport and Local Switching revenue requirements does not adversely affect particular customers to any significant degree. *Id.*[5]

III. DISCUSSION

11. US West has failed to present sufficient reason to support waiver of Part 69 of the Commission's Rules to allow it to target the Local Transport and Local Switching rate elements at the authorized rate of return on a combined basis. We therefore deny the waiver, reject the proposed rates, and direct US West to refile its informational rates not later than March 15, 1989. The revised transmittal should continue to show an effective date of April 1, 1989.[6]

12. In order to justify waiver of the rules, a petitioner must plead, with particularity, the facts and circumstances which warrant such action.[7] US West advances several reasons why it believes the requested waiver would be consistent with the public interest, but its justification is essentially speculative and unpersuasive. First, the fact that its largest access customer, AT&T, twice has filed petitions against US West's proposed rates suggests strongly that US West's rate-shock concerns are at best conjectural. Further, as US West concedes, customers purchase, and are billed for, Local Switching and Local Transport together. Indeed, US West itself asserts that granting this waiver request would for this reason have little overall impact on most customers.[8] In the face of these admissions, US West's rate shock argument is entirely untenable. We therefore conclude that, even assuming, *arguendo*, that US West's rate shock concerns would be a valid basis on which to grant its petition, its arguments do not meet US West's burden of demonstrating that the requested waiver would serve the public interest.[9]

13. Even if US West's rate shock theory were not thus undercut, US West has failed to state with particularity the cause of the asserted revenue requirement shifts. The underlying basis of US West's petition is that the revenue requirement shifts it has experienced are the result of changes in the Commission's Rules and the transition to digital facilities. US West does not identify these changes, nor does it suggest that either of these trends is likely to be reversed. US West gives us no reason to believe that either recent rule changes or the growth of US West's digital network are producing rate instability; rather, to the extent these phenomena are causing shifts in revenue requirement in one direction or another, they are part of a trend that is likely to continue.

14. We note, however, that the decline in Local Switching revenue requirements is a predictable result of the decision to revise the separations formula for the apportionment of central office equipment.[10] The Joint Board and the Commission concluded that the new formula will produce results that are more consistent with principles of cost-causation.

15. Moreover, US West's proposal would have the effect of lowering Local Transport rates by raising Local Switching rates. US West defends this approach as "cost based" (even though the resulting rates differ from the costs allocated by the Part 69 Rules) because such rates reflect unit costs. This contention is again unlikely -- it is improbable that an averaging of allocated costs for two separate elements happens to produce more accurate costs for both. Even the use of current rates as allocators does not cure the apparent arbitrary nature of the proposed rate methodology. Changes in the Commission's Rules are in general intended to improve the accuracy of rates or implement policy goals. We know of no reason to believe, as US West would have it, that the current Rules produce contrary results. In any event, US West has provided no evidence to support this claim.

16. It is also appropriate to give special scrutiny to requests of this type for they may reflect anticompetitive or at least uneconomic incentives. ICs must use LEC Local Switching to be connected with customers of local exchange service, but may choose to locate their Points of Presence to provide more or less of the Local Transport mileage themselves. As AT&T notes, artificially lowering the Local Transport rate would provide artificial price incentives for IC decisions to locate their facilities and, thus, undermine one purpose of the Part 69 Rules. US West argues that such artificial prices serve a public policy goal of maximizing use of the public switched network. The access charge rules were adopted to achieve efficient provision of service through cost-based rates and competition. US West makes no persuasive showing that its proposed waiver achieves this set of goals better than the Part 69 Rules.[11] For the foregoing reasons, we deny US West's petition and direct it to remove the proposed waiver rates and refile its informational rates.

IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that the petition for waiver filed by Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company IS DENIED.

18. IT IS FURTHER ORDERED that Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company SHALL FILE tariff revisions not later than March 15, 1989, with a scheduled effective date of April 1, 1989, in order to remove the proposed waiver rates and include in the tariff its informational rates. For this purpose, Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived and Special Permission No. 89-194 is assigned.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] Mountain States Telephone and Telegraph Company, DA 88-1993, released Dec. 23, 1988 (*US West Waiver Order*).

[2] AT&T cites *Southwestern Bell Telephone Co.*, Mimeo No. 2621, released Feb. 14, 1986, and *Investigation of Access and Divestiture Related Tariffs*, 97 FCC 2d 1082, 1098-99 (1984) (*ECA Tariff Order*) in support of its argument.

[3] AT&T pauses to note, however, that the manner in which US West has chosen to implement the waiver affects AT&T disproportionately. AT&T states that the waiver rates would increase AT&T's switched access costs by $7 million compared to the informational rates. *Id.* at 7 n.*.

[4] *Id.* at 7-8 (citing Amendment of Part 69 of the Commission's Rules and Regulations, Access Charges, To Conform It with Part 36, Jurisdictional Separations Procedures, 2 FCC Rcd 6447 (1987) (*Part 69 Conformance Order*), Order on Reconsideration, FCC 88-400, released Dec. 12, 1988).

[5] At the same time, in response to AT&T's contention that the proposed transport rates would increase AT&T's transport costs by $7 million as compared to the informational rates, US West states that "[i]f, in fact, a seven million dollar increase is experienced by AT&T, this amount would be offset by a comparable decrease to other IXCs."

[6] Our directive to US West to refile its informational rates does not, of course, represent any finding regarding the lawfulness of these rates. Any determination concerning whether further revisions may be necessary must await our comprehensive Order reviewing the 1989 annual access tariff filings.

[7] *E.g.*, WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969); Rio Grande Family Radio Fellowship v. FCC, 406 F.2d 664 (D.C. Cir. 1968).

[8] US West thus tacitly concedes AT&T's argument that an increase in one element will be largely offset by a decrease in the other.

[9] We note that granting US West's request could make it more difficult to detect abnormal cost shifts, and thus make it more difficult to evaluate the proposed rates.

[10] *See* MTS and WATS Market Structure, 2 FCC Rcd 2639 (1987).

[11] In particular, US West's argument that there are no right or wrong cost allocators provides no positive support for its proposal, which adds an apparently arbitrary adjustment to the costs allocated according to the Commission's Rules. If US West believes that some other allocation will produce economic efficiency, it may, of course, file a petition for Rule Making that proposes some other allocation formula and explains why US West believes the alternative formula would be better.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 78-72

In the Matter of

MTS and WATS Market Structure

Amendment of Part 69 of the
Commission's Rules for Recovery
of Equal Access Costs

ERRATUM

Released: March 14, 1989

On February 17, 1989, the Commission released a Report and Order in this proceeding, FCC 89-16. In the Appendix of this Report and Order, Subsection (nn) and Paragraph 7 were inadvertently mislabeled.

The correct labeling for Subsection (nn) should be (ll).

The correct labeling for Paragraph 7 should be 6.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New England Telephone and Telegraph Company Tariff F.C.C. No. 40	Transmittal No. 930
New York Telephone Company Tariff F.C.C. No. 41	Transmittal No. 913

MEMORANDUM OPINION AND ORDER

Adopted: November 3, 1988; Released: November 4, 1988

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On July 25, 1988, New England Telephone and Telegraph Company (NET) and New York Telephone Company (NYT), collectively the NYNEX Companies (NYNEX), filed the above-referenced tariff revisions, which seek to clarify that Feature Group A (FGA) telephone lines are included in the calculation and application of NYNEX's Equal Access Cost Recovery (EACR) rate element. MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate on August 9, 1988, and NYNEX filed a reply on August 19, 1988. These tariff revisions are scheduled to become effective on November 6, 1988. For the reasons discussed below, both NET's and NYT's proposals are suspended for five months to allow the Commission time to investigate whether FGA lines may properly be included in the calculation and application of NYNEX's EACR rate element.

II. PLEADINGS

2. MCI asserts that the inclusion of FGA lines in NYNEX's EACR rate element is inappropriate because the lines are not provided at end user locations as that term is defined in both NYNEX tariffs and the Commission's Rules.[1] MCI bases this argument on NYNEX tariff language which states that the EACR monthly charge is based on the total number of equal access lines in a Local Access and Transport Area (LATA), which are all "in-service lines and trunks provided at end user locations and served by end offices equipped with equal access . . ."[2] In addition, MCI argues that NYNEX is only seeking to revise its tariff because NYNEX has been erroneously billing MCI by including FGA lines in calculating its EACR charge. MCI offers as proof the fact that when it confronted both NYNEX companies with its allegation of error, NET conceded that MCI had a valid dispute by crediting MCI's account. [3]

3. NYNEX responds that the reason NET credited MCI's account is not because FGA lines should not be included in its EACR rate element. Instead, NYNEX maintains, as its tariffs are currently worded, interexchange carriers (ICs) may validly claim confusion as to whether NYNEX's EACR charge includes FGA lines.[4] Furthermore, NYNEX argues that since the dispute stems from the fact that its tariffs are not clear as to whether FGA lines are included in its EACR charge, NYNEX may properly choose to revise its tariffs so as to clearly provide for FGA line inclusion.[5]

4. Finally, NYNEX supports its contention that local exchange carriers (LECs) should be able to count FGA lines in calculating EACR charges by arguing that FGA lines can be presubscribed and used to gain access to IC switches by dialing "1," "0," or "10XXX."[6] NYNEX explains that ICs can use FGA lines to route interLATA traffic on their own networks, to route overflow traffic to other ICs' networks, and to provide private line services, such as Foreign Exchange.[7] Hence, FGA lines, according to NYNEX, have equal access capabilities and should be included in calculating and applying its EACR charge.

III. DISCUSSION

5. Under the Modification of Final Judgment (MFJ), the Bell Operating Companies are required to provide equal access to ICs that is "equal in type, quality, and price" to that given to AT&T.[8] Independent LECs were subsequently required to provide equal access by the Commission in Phase III of the *MTS and WATS Market Structure* proceeding, CC Docket No. 78-72.[9]

6. Under the current Part 69 access charge rules, equal access costs are assigned to the Local Switching element.[10] The Common Carrier Bureau, however, has granted waivers allowing LECs to establish a separate rate element for recovering equal access costs.[11] NYNEX was one of the LECs granted such a waiver.[12] The Order granting its waiver stated that NYNEX's EACR charge would be a flat rate monthly charge assessed to ICs who obtain Feature Group D (FGD) Switched Access Service. The Order further stated that the charge would be calculated by multiplying the IC's percentage of presubscribed equal access lines in the LATA times the monthly rate per equal access line. The IC's percentage would be determined by dividing the total number of presubscribed equal access lines and trunks in the LATA presubscribed to that IC by the total number of presubscribed equal access lines.[13]

7. The *NYNEX Order* only specifically refers to FGD lines; the issue of inclusion of FGA lines in the calculation and application of NYNEX's EACR charges was not before us at that time. Therefore, it is questionable whether the existing waiver is adequate to permit the revisions proposed by NYNEX. Accordingly, we suspend the above-referenced revisions for five months. During the suspension period, we will investigate whether the NYNEX tariff is consistent with the existing waiver. NYNEX must submit a direct case explaining why it believes a new or revised waiver is not required.

IV. ORDERING CLAUSES

8. Therefore, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions are suspended until April 6, 1988, five months from the present scheduled effective date.

9. IT IS FURTHER ORDERED that, pursuant to Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, New England Telephone and Telegraph Company and New York Telephone Company are directed to file their direct case within 30 days of release of this order. Oppositions may be filed 15 days thereafter, and New England Telephone and Telegraph Company and New York Telephone Company may reply within 15 days thereof.

10. IT IS FURTHER ORDERED that New England Telephone and Telegraph Company and New York Telephone Company shall issue supplements to their tariffs no later than November 10, 1988 indicating that the subject tariff revisions ARE SUSPENDED.

11. IT IS FURTHER ORDERED that Special Permission No. 88-523 is assigned for the purpose of issuing the above supplement.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* New England Telephone and Telegraph Company, Tariff F.C.C. No. 40 and New York Telephone Company, Tariff F.C.C. No. 41 at Section 2.6; *see also* 47 C.F.R. § 69.2(m). Both the NYNEX tariffs and section 69.2(m) of the Commission's Rules define end user as "any customer of an interstate or foreign telecommunications service that is not a carrier, except that a carrier other than a telephone company shall be deemed to be an 'end user' when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an 'end user' if all resale transmissions offered by such reseller originate on the premises of such reseller."

[2] MCI Petition at 2; *see also* New England Telephone and Telegraph Company, Tariff F.C.C. No. 40 at Section 16.2.(A) and (B), 3rd Revised Page 226; New York Telephone Company, Tariff F.C.C. No. 41 at Section 16.2.(A) and (B), 2nd Revised Page 220.

[3] MCI Petition at 3-4. As part of its petition, MCI also complains that even though NET credited its account, NYT has not although NYT has admitted that MCI has legitimately disputed the past EACR charge. This tariff proceeding is not the proper forum for MCI to present this claim. Rather, MCI should file a complaint pursuant to Section 208 of the Communications Act, 47 U.S.C. § 208, to pursue this particular grievance.

[4] NYNEX Reply at 2.

[5] *Id.* As a matter of fact, NYNEX admits that it has been including FGA lines in its EACR charge.

[6] NYNEX Reply at 4-5.

[7] *Id.* at 5 n.6.

[8] United States v. American Tel. & Tel. Co., 552 F.Supp. 113, 196-200 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 100 (1983).

[9] *See* United States v. Western Elec. Co., Inc. (*Western Electric*), 569 F.Supp. 1057, 1067 (D.D.C. 1983).

[10] *See* 47 C.F.R. §§ 69.308, 69.410.

[11] *See, e.g.*, New England Telephone and Telegraph Company and New York Telephone Company, Mimeo No. 2636, released Feb. 20, 1985; Chesapeake and Potomac Telephone Company, Mimeo No. 3375, released Apr. 3, 1985; Southern Bell and South Central Bell Telephone Companies, Mimeo No. 5015, released June 11, 1985; Mountain States Telephone and Telegraph Company, Mimeo No. 5548, released July 3, 1985; Southwestern Bell Telephone Company, Mimeo No. 6157, released Aug. 6, 1985.

[12] *See* New England Telephone and Telegraph Company and New York Telephone Company, Mimeo No. 2636, released Feb. 20, 1985 (*NYNEX Order*).

[13] *Id.* at para. 2. The *NYNEX Order* ,also noted that the total number of presubscribed equal access lines would include all equal access lines and trunks in the LATA for which customers have designated the IC as their predesignated carrier as well as default customers' lines and trunks, *i.e.*, any equal access lines and trunks not presubscribed to any IC but which continue to give customers access to interstate MTS/WATS without dialing the IC's access code.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

OPASTCO Petition for Waiver
of Section 69.3(f) of
the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: November 10, 1988; Released: November 18, 1988

By the Chief, Common Carrier Bureau:

1. On July 6, 1988, the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO) filed a petition for waiver[1] of Section 69.3(f) of the Commission's Rules, 47 C.F.R. § 69.3(f), which would enable small telephone companies to file access tariffs on a one-time basis to become effective January 1, 1990, for a one-year period.[2] As recently revised, [3] Section 69.3(f) now reads in pertinent part:

> A tariff for access service provided by a telephone company that may file an access tariff pursuant to Section 61.39 may be filed for a biennial period with a minimum of 90 days notice and scheduled effective date of July 1 of any odd numbered year. An eligible telephone company that does not elect to file an access tariff pursuant to the Section 61.39 procedures may elect to file a biennial tariff pursuant to this section.

Although in the future the small companies' biennial access tariffs must be filed by April 1 to become effective on July 1, the 1989 filings will become effective April 1, 1989.[4] As a result, the small companies must file their next access tariffs by December 30, 1988.

2. OPASTCO contends that it should be granted this waiver to give small telephone companies an additional opportunity to opt out of the National Exchange Carrier Association (NECA) pools. Although pooling companies are annually given the opportunity to leave NECA, carriers choosing to file streamlined tariffs under Section 61.39 of the Commission's Rules, 47 C.F.R. § 61.39, are in reality given that chance only every other year because such companies must file biennial tariffs pursuant to Section 69.3(f). Thus, while a company filing pursuant to Section 61.39 may opt out of NECA in an even-numbered year, it may not file a tariff pursuant to Section 61.39 until April 1 of the following year (to be effective July 1 of that year). Of course, a company may eschew the streamlined procedures and annually file full Section 61.38 tariff cost support, preserving its yearly opportunity to leave NECA.

3. The recent changes to the access charge filing schedule would delay the second opportunity to use Section 61.39 procedures.[5] The change in access charge filing schedules was not intended to erect unnecessary impediments against small companies' exiting the NECA pools. Pursuant to the present schedule, the next opportunity for carriers proceeding under Section 61.39 to file tariffs independent of NECA will be April 1, 1991, with an effective date of July 1, 1991. Allowing the small carriers to file in 1990 pursuant to this waiver will reduce that period. Therefore, we believe it is in the public interest to grant OPASTCO's waiver request. Tariffs filed by small carriers proceeding under Section 61.39, to be filed on or before April 1, 1990, will therefore become effective July 1, 1990, for a period of one year.

4. Accordingly, IT IS ORDERED that Section 69.3(f) of the Commission's Rules, 47 C.F.R. § 69.3(f), IS WAIVED in accordance with the provisions of this Order for companies filing biennial access tariffs pursuant to Section 61.39 of the Commission's Rules, 47 C.F.R. § 61.39.

5. IT IS FURTHER ORDERED that such companies shall file their next access tariffs on or before April 1, 1990, to become effective July 1, 1990, for a period of one year.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] No pleadings were filed with regard to the OPASTCO petition.

[2] This date would now be July 1, 1990, in light of Access Tariff Filing Schedules, CC Docket No. 88-326, Order, FCC 88-283, released Sept. 14, 1988 (*Access Tariff Schedules Order*).

[3] *See* Regulation of Small Telephone Companies, CC Docket No. 86-467, DA 88-1408, Order, released Sept. 27, 1988.

[4] *Access Tariff Schedules Order* at para. 10.

[5] *See* Regulation of Small Telephone Companies, CC Docket No. 86-467, 2 FCC Rcd 3811 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Tariff F.C.C. No. 16 — Transmittal No. 1493

ORDER

Adopted: February 3, 1989; Released: February 6, 1989

By the Chief, Common Carrier Bureau:

1. On January 24, 1989, AT&T Communications (AT&T) filed the above-referenced transmittal, proposing rates, terms, and conditions for Federal Telecommunications System 2000 (FTS 2000). With its filing, AT&T submitted two versions of the tariff pages containing the revisions, with the prices deleted from one version (Redacted Version). AT&T also filed an application for special permission, requesting waiver of Sections 61.2, 61.54(j), and 61.72 of the Commission's Rules, 47 C.F.R. §§ 61.2, 61.54(j), 61.72, to the extent that they require AT&T to file on the public record and otherwise publish the FTS 2000 rates.[1] AT&T proposes to file only the Redacted Version on the public record. On February 3, 1989, the Commission released a Public Notice requesting comments on AT&T's waiver request.[2] The comments are due no later than February 10, 1989.

2. Under the Commission's Rules, petitions against Transmittal 1493 are due to be filed on February 8, 1989. *See* Section 1.773(a)(2)(ii) of the Commission's Rules, 47 C.F.R. § 1.773(a)(2)(ii). In light of the Commission's request for comments on AT&T's waiver request, the Bureau has determined that good cause exists for deferral of the date for filing petitions against Transmittal 1493.

3. Accordingly, IT IS ORDERED, that the date for filing petitions against AT&T Transmittal No. 1493 IS DEFERRED until further notice.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Letter from W.E. Lind, Administrator Rates and Tariffs, AT&T, to Secretary, Federal Communications Commission, Application No. 511, Jan. 24, 1989.

[2] Public Notice, DA 89-137, released Feb. 3, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 7, 1989

PROCEDURES FOR FILING ERRATA TARIFF PAGES AND SUPPORT INFORMATION IN CONNECTION WITH THE ANNUAL 1989 ACCESSS TARIFFS

In a Public Notice released January 13, 1989, Procedures for Filing Errata to Support Information for Annual 1989 Access Tariffs, DA 89-31 (Public Notice) and in a related Order[1] the Common Carrier Bureau (Bureau) established procedures which the local exchange carriers (LECs) were to follow in the filing of errata associated with their Annual 1989 Access Tariffs.

For the most part, the applications for special permission were filed by the LECs on Monday, January 23, and Tuesday, January 31, 1989, as directed by the Public Notice.

The Tariff Division is in the processs of reviewing these applications and determining whether to grant the requested special permissions by the filing LECs.

Grants which are being made by the Division require the LECs to make their responsive tariff filingss on Wednesday, February 8, 1989. In particular, this material should include all revised TRP and cost support data. Distribution of such filings is to be in accordance with the Public Notice.

The Public Notice established a filing date of no later than Thursday, February 9, 1989, for those parties interested in filing comments concerning the errata application filings. The Public Notice also indicated that the Bureau did not anticipate opportunities for further comment after February 9, 1989. However, because of the complexity of the errata applications, the Bureau has decided to defer the date for the supplemental comments in connection with the errata which will be filed by the LECs under new or amended transmittal letters on February 8, 1989. Therefore, interested parties may file comments concerning these transmittals no later than Wednesday, February 15, 1989. No further comments are contemplated.

For further information, contact Judy Nitsche at 632-5550 or Daniel Grosh at 632-6387.

FEDERAL COMMUNICATIONS COMMISSION

FOOTNOTE

[1] Order, Annual 1989 Access Tariff Filings, DA 89-82, released Jan. 30, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-82

In re Applications of

GNOL BROADCASTING, INC. File No. BPCT-861030KG

R. L.BUSH, JR. File No. BPCT-861216II

For Construction Permit for a
New Commercial Television Station
Morganton, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 1989; Released: March 13, 1989

By the Review Board: MARINO(Chairman), BLUMENTHAL, and ESBENSEN.

1. On November 25, 1988, Administrative Law Judge Edward Luton(ALJ) released his *Initial Decision*, 3 FCC Rcd 6796 (1988)(I.D.) in this proceeding, granting the application of GNOL Broadcasting, Inc. (GNOL), and denying the application of R.L. Bush, Jr. (Bush). The I.D. turned solely on comparative considerations, and neither applicant was presented with disqualifying issues.

2. On December 28, 1988, the prevailing applicant, GNOL, timely filed its Brief in Support of Initial Decision and Contingent Exceptions requesting, *inter alia*, that "if review is otherwise not to be taken, these contingent exceptions need not be reviewed."

3. To date, Bush has not filed any exceptions. Thus, with the time for filing exceptions having passed (30 days, pursuant to Section 1.276(a)(1) of the Commission's Rules, 47 CFR §1.276(a)(1)), we will dismiss the application of Bush pursuant to Section 1.276(f) of the Commission's Rules, 47 CFR §1.276(f)("When any party fails to file exceptions within the specified time to an initial decision, such party shall be deemed to have no interest in further prosecution of its application, and its application may be dismissed for failure to prosecute"). *See Catherine Juanita Henry*, 3 FCC Rcd 5569 (Rev.Bd. 1988); *Mark L. Wodlinger*, 3 FCC Rcd 698 (Rev.Bd. 1988).

4. With the dismissal of Bush's application, GNOL is the only remaining applicant. Having prevailed in the proceeding below, and having been determined to be fully qualified to construct and operate as proposed, GNOL's application will be granted.

5. ACCORDINGLY, IT IS ORDERED, That, pursuant to its request, the Brief in Support of Initial Decision and Contingent Exceptions filed by GNOL Broadcasting, Inc., on December 28, 1988, is DISMISSED as moot; and,

6. IT IS FURTHER ORDERED, That, pursuant to 47 CFR 1.276(f), the application of R. L. Bush, Jr. (File No. BPCT-861216II) for a new television facility at Morganton, North Carolina IS DISMISSED; and,

7. IT IS FURTHER ORDERED, That the application of GNOL Broadcasting, Inc. (File No. BPCT-861030KG), for that same facility IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

MONTGOMERY INDEPENDENT CELLULAR TELEPHONE COMPANY, INC. File No. 22349-CL-P-139-B-86

For a construction permit to establish a new cellular system to operate on Frequency Block B in the Domestic Public Cellular Radio Telecommunications Service to serve the Montgomery, Alabama MSA

MEMORANDUM OPINION AND ORDER

Adopted: February 27, 1989; Released: March 13, 1989

By the Commission:

BACKGROUND

1. On June 2, 1986, the application of Montgomery Independent Cellular Telephone Company, Inc. (MICTC) was selected first in the lottery for the wireline Block B construction authorization for the Montgomery, Alabama Metropolitan Service Area (MSA). BellSouth Mobility Inc. (BMI) filed a petition to deny and MICTC filed an opposition to the petition to deny.

2. MICTC is an Alabama corporation. It is owned by five corporations. Four of them are local exchange telephone companies in Alabama: Mon-Cre Telephone Cooperative, Inc. (Mon-Cre), Monroeville Telephone Company, Inc.(Monroeville), Goshen Telephone Company, Inc.(Goshen), and Hayneville Telephone Company Inc (Hayneville). Each of these companies owns a 16 percent interest in MICTC, totalling 64 percent. Cellular Systems Investment, Inc., which is not an exchange telephone company, owns 36 percent. Of the companies that own MICTC, only Mon-Cre, representing a 16 percent ownership interest, is certificated to provide landline service in the Montgomery MSA.

THE PROCEEDINGS BELOW

3. BMI argued in its petition to deny that MICTC's application must be dismissed because MICTC is not itself a provider of wireline telephone service within the Montgomery, Alabama MSA, as required by the Commission's rulings in *Cellular Communications Systems* [1] nor is it controlled by a provider of wireline telephone service in the Montgomery, Alabama MSA, as required by the Commission's decision in *Advanced Mobile Phone Service, Inc. (Los Angeles Decision).* [2]

4. Relying on Section 22.902(b) of the Rules and the *Report and Order* in *Cellular Communications Systems*, [3] MICTC argued that it was eligible to provide cellular service on the wireline block in the Montgomery, Alabama MSA. MICTC claimed that it provides service "indirectly" in that MSA because, pursuant to Section 22.13(a)(1)(ii) of the Rules[4] it is an "affiliate" of Mon-Cre, a wireline that is certified to provide service in the market for which MICTC applied. MICTC claimed that although a majority of its owners were not certificated in the Montgomery, Alabama MSA, its owners were nevertheless certificated in the "general area" of that MSA.[5] Finally, MICTC argued that even if more than affiliation were required, Mon-Cre had exercised a sufficient degree of control over MICTC to establish MICTC's eligibility pursuant to the *Los Angeles Decision*.

5. On July 22, 1987, the Mobile Services Division (MSD) released a Memorandum Opinion and Order dismissing the MICTC application.[6] In the *Order*, the MSD held that MICTC was ineligible to apply for the wireline frequency for the Montgomery, Alabama MSA because it did not meet the wireline eligibility requirements set out in Section 22.902(b) of the Rules and interpreted in the Commission's *Los Angeles Decision*. The MSD found that MICTC was ineligible because it was neither a provider of wireline service in that MSA nor was it controlled by a provider of such service there. The MSD held that, contrary to MICTC's assertion, Section 22.13(a)(1) did not define "affiliate" for purposes of wireline application eligibility but rather, pursuant to the *Los Angeles Decision*, "the ownership interest [of the ineligible carrier] must be minor and control of the company must remain vested in the eligible carrier. . . ."[7] The MSD concluded that, although Mon-Cre was an eligible carrier, the ownership interests of the ineligible carriers could not be characterized as minor since they totalled 84 percent.

6. MICTC then filed a petition for reconsideration reiterating the arguments it had raised in its opposition to the petition to deny. Further, MICTC argued that it did not have adequate notice of the "control" requirement[8] in the *Los Angeles Decision*. It interpreted the "control" requirement as a clarification of Section 22.13(a)(1)(ii) of the Rules, which, pursuant to the Administrative Procedures Act (APA), should have been published in the Federal Register, but was not.[9] MICTC also argued that it did not have adequate notice that the term "general area" referred only to areas within the MSA. Further, MICTC noted that the Commission had accepted other applications reflecting cellular settlements with similar ownership structures in the past and therefore should have accepted MICTC's application. MICTC also argued that adding a "control" requirement over and above the affiliate requirement of Section 22.13(a)(1)(ii) was not consistent with the purposes underlying the wireline set-aside and that those purposes are better served by retaining what MICTC claimed was the "original" affiliate standard. Finally, MICTC argued that even if its application was defective, it should now be permitted to amend its application to reflect a corporate structure which satisfies the requirements of Section 22.902(b) of the Rules.

7. In *Montgomery Independent Cellular Telephone Company, Inc.*, 3 FCC Rcd. 396 (Comm. Car. Bur. 1988) (*Reconsideration Order*), the Common Carrier Bureau affirmed the MSD's holding that MICTC was ineligible to apply for the wireline frequency block for the Montgomery, Alabama MSA because it had not complied with

Section 22.902(b) of the Rules as promulgated in the *Cellular Communications Systems* proceeding and in the *Los Angeles Decision*. The Bureau agreed with the MSD that because Mon-Cre's ownership interest in MICTC was only 16 percent, a minor ownership interest under the *Los Angeles Decision*, MICTC was not eligible through Mon-Cre to apply for the Montgomery MSA. The Bureau reaffirmed that Section 22.13(a)(1)(ii) was not the applicable definition of affiliate and that this definition was applicable only to real party in interest disclosures. Further, the Bureau held that MICTC had adequate notice of the "control" requirement of the *Los Angeles Decision* and the definition of "general area", which definition it concluded, contrary to MICTC's assertion, referred to areas only within the MSA.[10] The Bureau further concluded that even though the Commission had inadvertently accepted other applications reflecting similar cellular settlements in the past, it has been the consistent policy of the Commission to reject all ineligible cellular applicants. Finally, the Bureau concluded that MICTC could not amend its application to reflect a corporate structure which satisfies the Section 22.902(b) requirements because those requirements pertain to the applicant's eligibility to apply for a cellular construction authorization initially.

APPLICATION FOR REVIEW

8. In its application for review, MICTC reiterates the arguments it raised in both its opposition to the petition to deny and its petition for reconsideration. It characterizes the imposition of a "control" requirement in the *Los Angeles Decision* as an interpretation or clarification of the definition of "affiliate" in Section 22.13(a)(1)(ii) of the Rules, promulgated in contravention of the APA. MICTC also states that the meaning of "general area" was unclear and confusing prior to the Commission's *Rural Cellular* order,[11] published after MICTC filed its application. Further, MICTC argues that the "control" requirement of the *Los Angeles Decision* was merely *dicta* and was not sufficiently specific to give MICTC notice. In addition, MICTC argues that because none of the ineligible carriers individually had more than a minor ownership interest in MICTC, MICTC meets the "control" requirement of the *Los Angeles Decision*. Finally, MICTC argues that adding a "control" requirement is not consistent with the purposes underlying the wireline set-aside and that those purposes are better served by retaining the "affiliate" standard contained in Section 22.13(a)(1)(ii) of the Rules.

DISCUSSION

9. We deny MICTC's application for review. First, we affirm the Bureau's conclusion that the definition of affiliate in Section 22.13(a)(1)(ii) of the Rules does not provide the applicable definition of "affiliate" for purposes of wireline eligibility. Rather, as Section 22.13(a)(1)(ii) indicates that definition applies only to an applicant's disclosure of the real parties in interest behind its application.[12] The application of the Section 22.13(a)(1)(ii) definition of affiliate to the eligibility requirements would require the conclusion that any applicant could be eligible to apply for the wireline block as long as an eligible wireline owned five percent or more of the applicant. Under such a construction, a non-wireline carrier could own 95 percent of the entity applying for the block of frequencies reserved for wireline applicants. Such a result would clearly defeat the purpose of the separate wireline allocation.

10. We find that Section 22.902(b) of the Rules, as interpreted in the *Los Angeles Decision*,[13] defines the standards for wireline eligibility when the applicant itself is not a local wireline carrier. The *Los Angeles Decision* left no doubt of our intention that the ineligible carrier's ownership interest in the applicant must be minor and that control must remain vested in the eligible carrier.[14]

11. Second, for the reasons stated in the *Reconsideration Order*, we affirm the Bureau's conclusion that MICTC had sufficient notice prior to the filing of its application and prior to our clarification of that term in the *Rural Cellular* order, that the term "general area" applies only to the MSA in question and not the adjacent areas, as argued by MICTC. As the Bureau noted, the term "general area" was adequately defined in the cellular Rule Making decisions[15] and in the *Los Angeles Decision*, all of which were released prior to *Rural Cellular* and prior to MICTC's filing.[16] Specifically, in the *Los Angeles Decision*, the Commission noted in its summary of the *Cellular Communications Systems* rulings: "Eligibility for the 20 MHz wireline allocation was limited to those telephone companies already providing wireline telephone service in a particular *market*. "[17] This statement was amply supported by the Commission's rulings in *Cellular Communications Systems*. In its *Further Reconsideration Order*, the Commission stated that the cellular geographic service areas were to be based on standard metropolitan statistical areas and that wireline carriers will be eligible to provide cellular service in any SMSA in which they are certified to provide landline service.[18] In the *Report and Order*, the Commission said it would "consider a wireline applicant to be eligible to apply only in those areas in which it or an affilaite company is certified as a wireline carrier and that it would only consider one applicant per *market*. "[19] In its *Reconsideration Order* in the same docket, the Commission noted that wireline carriers are "easily identifiable since they are already certified in the same general area" as the markets to be served. If "general area" is construed to include areas outside the MSA without further definition, the wireline carrier will be anything but "easily identifiable." Further, the Commission stated that "[w]here more than one wireline company is certificated in a standard metropolitan statistical area (SMSA), and those carriers desire to provide cellular service, we strongly urge them to reach mutually acceptable arrangements in order to avoid electrically mutually exclusive applications which require comparative hearings."[20] In light of these pronouncements, we find that the term "general area" was "reasonably comprehensible", and therefore meets the notice requirement of *Radio Athens, Inc. (WATH) v. FCC*.[21]

12. Next, we affirm the Bureau's conclusion that the "control" requirement in the *Los Angeles Decision* was briefed and argued. In the *Los Angeles Decision*, it was briefed and argued that because United States Cellular Corporation (USCC), one of the limited partners in the Los Angeles wireline settlement group, was not a local telephone company in the Los Angeles area, it was an ineligible carrier, which "pursuant to the right of first refusal provision in the Agreement, could acquire up to a 60 percent interest in the system over a period of time."[22] Thus, the nexus between a carrier's eligibility and its

ability to acquire majority ownership or control was briefed and argued in the record. *See* ICS/MCI comments at 10. In response to this argument, we clearly stated:

> As a general matter, we find that it is permissible for ineligible carriers to have both a minority ownership interest in an eligible cellular applicant during the two-year set-aside period. Therefore, both ineligible wireline carriers and nonwireline carriers would have minority ownership interests in a wireline company, and vice versa. However, the ownership interest must be minor and control of the company must remain vested in the eligible carrier during the two-year set-aside period. . . . Therefore, so long as USCC does not acquire a majority of the limited partner shares during the two year set-aside period, its participation in the wireline system is consistent with our rules and policies.[23]

Thus, the "control" language in the *Los Angeles Decision* was not *dicta*. Indeed, in a subsequent decision, we have characterized the *Los Angeles Decision* as "holding" that entities prosecuting cellular applications must be under the control of a carrier eligible for the frequency block for which it applied.[24]

13. We also reject MICTC's argument that, because none of the ineligible carriers individually had more than a minor ownership interest, MICTC met the "control" requirement of the *Los Angeles Decision*. As noted in the *Order* and *Reconsideration Order*, the *Los Angeles Decision* stated that "the ownership interest [of the ineligible carrier] must be minor *and* control of the company must remain vested in the eligible carrier. . . ."[25] Although the facts in the *Los Angeles Decision* only involved one ineligible carrier, it is the clear import of that order that if there is more than one ineligible carrier, their total ownership interest must also be minor. The ineligible carriers in this case have a total ownership interest of 84 percent in MICTC, which interest is not minor. Therefore, MICTC was not eligible to apply.[26]

14. Next, we reject MICTC's argument that the Commission is barred from strictly enforcing the eligibility requirements of Section 22.902(b) of the Rules in this case because the Division and Bureau may have inadvertently permitted other applicants to file cellular settlements identical to MICTC's. As the Bureau correctly noted: "The Commission has not initiated any new policy or practice requiring a stricter interpretation of the eligibility rules. It has been the consistent policy of the Commission to reject all ineligible cellular applicants."[27]

15. Finally, MICTC argues that the "control" requirement is not consistent with the dual purposes it perceives as underlying the wireline set-aside and that those purposes are better served by utilizing the "affiliate" standard for real party in interest issues. We have previously addressed this question in the *Los Angeles Decision* where we held: "This decision is consistent with the objectives of the eligibility requirement: avoiding lengthy comparative hearings and speeding implementation of service. Minority wireline/non-wireline participation will not cause additional applications or delays beyond the Commission's general review of the limited partnership agreement."[28] *Los Angeles Decision*, 93 FCC 2d at 692.

16. For the foregoing reasons, we affirm the Bureau's decision to dismiss MICTC application for failure to meet the wireline application eligibility requirements.[29]

ORDERING PARAGRAPHS

17. Accordingly, IT IS ORDERED, that the Application for Review filed by Montgomery Independent Cellular Telephone Company, Inc. IS DENIED.

18. IT IS FURTHER ORDERED, that the *Order on Reconsideration*, 3 FCC Rcd. 396 (1988) IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Report and Order*, 86 FCC 2d 469, 490 n. 56 (1981), *recon.* 89 FCC 2d 58, 75-77 (1982), *further recon.* 90 FCC 2d 571, 577-78 (1982), *appeal dismissed sub nom. United States v. FCC*, No. 82-1526 (D.C. Cir. 1983).

[2] 93 FCC 2d 683, 692 (1983).

[3] At the time MICTC filed its application for the wireline freqency block in Montgomery, Section 22.902(b) of the Rules provided in pertinent part that "common carriers also engaged directly or indirectly in the business of affording public landline message service will be assigned frequencies from Cellular System B in those general areas in which they provide such landline service in some portion of the cellular market . . . ." 47 C.F.R. 22.902(b), amended, *Rural Cellular Service First Report and Order*, 60 Rad. Reg. 2d (P&F) 1029 (1986). Corrected by erratum (Mimeo 7132) released September 26, 1986.

In the *Report and Order*, we stated we "will consider a wireline applicant to be eligible to apply only in those general areas in which it or an affiliate company is certified as a wireline carrier." 86 FCC 2d at 490 n. 56.

[4] Section 22.13(a)(1)(ii) of the Rules defines affiliate as any business holding a 5 percent or more interest in the applicant. The MSD stated that this definition was applicable only to real party in interest disclosures.

[5] Mon-Cre is certificated in rural portions of the Montgomery MSA as well as three adjacent RSAs. Hayneville is certificated to own lines in the adjacent RSA and also serves, by means of a reciprocal foreign exchange line arrangement with South Central Bell Telephone Company, a small area within the Montgomery MSA. It is not, however, certificated in this area. (Even if Hayneville's 16 percent were included with Mon-Cre's, it would not change our disposition of this proceeding.) Goshen and Monroeville are certificated and providing service in RSAs adjoining the Montgomery MSA.

[6] *See Montgomery Independent Cellular Telephone Company, Inc.*, 2 FCC Rcd 4385 (Mob. Serv. Div. 1987)(*Order*).

[7] 93 FCC 2d at 692.

[8] MICTC characterizes the eligibility standards required by the *Los Angeles Decision* as a "control" requirement. However, such standards require both control and majority ownership by the eligible carrier.

[9] MICTC also argued that it did not have notice of the issue of control because that issue was neither briefed nor argued in the *Los Angeles Decision* and therefore was merely *dicta*.

[10] The Bureau noted that although Section 552(a)(1)(D) of the APA requires agencies to publish in the Federal Register substantive rules of general applicability and statements of general policy or interpretations of general applicability, Section 552(a)(2)(A) permits interpretations of general applicability in the course of adjudicatory opinions to be made available for public inspection and copying. More generally, the Bureau concluded that the "control" requirement and the definition of "general area" were "reasonably comprehensible" to MICTC before it applied, which is the test for determining what constitutes adequate notice. *See Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398, 404 (D. C. Cir. 1968). The Bureau also ruled that, contrary to MICTC's argument, the "control" requirement was not *dicta*, but was both briefed and argued in the *Los Angeles Decision*.

[11] 51 Fed. Reg. 26895 (July 28, 1986), 60 Rad. Reg. 2d (P&F) 1029, 1035 n. 14 (1986).

[12] The definition of the term "affiliate" in Section 22.13(a)(1(ii) of the Rules was adopted by the Commission in the *900 MHz Paging* proceeding merely to prevent a single entity from filing more than one application in the same market. 900 MHz Paging, 89 FCC 2d 1337, 1353 n. 29 (1982).

[13] 93 FCC 2d at 692.

[14] In its application for review, MICTC cites several cases for the proposition that if an agency clarifies or interprets a rule or policy that is already clear, such clarification or interpretation must be published in the Federal Register. *See* MICTC Application for Review at 12-17. We note that the *Los Angeles Decision* did not clarify or interpret the definition of affiliate in Section 22.13(a)(1)(ii) of the Rules, as MICTC suggests. Rather, the *Los Angeles Decision's* imposition of a "control" requirement applied the eligibility requirements of Section 22.902(b) of the Rules. Thus, we find the cases cited by MICTC inapposite. In contrast, the cases cited in the *Reconsideration Order* all support the proposition that an agency may interpret a rule in the context of an adjudicatory opinion without the necessity of publication in the Federal Register. Therefore, because the *Los Angeles Decision* was interpreting the eligibility requirements of Section 22.902(b), it was not required to be published in the Federal Register pursuant to the APA.

[15] *See* note 1, *supra*.

[16] The *Rural Cellular* order merely codified the term "general area" as it had been previously used in these decisions.

[17] 93 FCC 2d at 685 (emphasis added).

[18] 90 FCC 2d at 577.

[19] 86 FCC 2d at 490 n. 56 (emphasis added).

[20] *Id.* at 76.

[21] 401 F.2d at 404.

[22] 93 FCC 2d at 691-93.

[23] 93 FCC 2d 692-693. We note that subsequently we concluded that the set-aside was merely a processing tool and, therefore, that once authorizations were granted, there was no reason to maintain further the set-aside. Thus, in effect, the set-aside ceases for particular facilities after an initial grant has been awarded. *See James F. Rill*, 60 Rad. Reg. 2d (P&F) 583, 593 (1986).

[24] *See e.g.*, James F. Rill, 60 Rad. Reg. 2d (P&F) 583, 592, para. 28 (1986); *see also id.* at 593, para. 32. MICTC states that subsequent approval of sales of non-wireline permittees to wirelines and vice-versa during the two-year set-aside further indicate that the control requirement in the *Los Angeles Decision* was merely *dicta*. *See* MICTC Application for Review at 18. MICTC's interpretation of *James F. Rill* and other decisions approving of sales of non-wireline permittees to wirelines and vice versa is mistaken. In *James F. Rill*, we indicated that the wireline/non-wireline dichotomy and our control requirement are valid processing tools the purposes of which have been satisfied upon grant of the application. In short, these cases are consistent with the *Los Angeles Decision's* control requirement.

[25] 93 FCC 2d at 692 (emphasis added).

[26] We note that it is not necessary to decide the issue of whether Mon-Cre, the only eligible carrier with an ownership interest in MICTC, has actually exercised *de facto* control over MICTC, because the ineligible carriers' total ownership interest in MICTC is not minor. However, we find MICTC's argument, that Mon-Cre controls MICTC, unpersuasive, particularly since the ineligible carriers each have the same or a greater percentage of ownership in MICTC.

[27] 3 FCC Rcd at 397.

[28] As an aside, we note that the dual purposes that MICTC perceives as underlying the wireline set-aside are not entirely correct. While MICTC appears to have drawn the purposes it has identified from the *Report and Order*, 86 FCC 2d at 487-90, *recon. granted in part*, 89 FCC 2d at 69-71, we subsequently revisited this issue in the *Cellular Lottery Rulemaking*, 98 FCC 2d 175, 194-98 (1984). Our new purposes encompassed ensuring that telephone companies generally had an opportunity to be involved in cellular, continuing to expedite service on the wireline side, and attempting to give the local rural wirelines an opportunity to become involved in cellular so that they could recoup any possible losses in customers. Id. at 194-97. It is self-evident from these goals, that the Commission was seeking, in the set-aside, to make special provisions for wireline carriers serving the particular market involved.

[29] MICTC's request that the Commission reinstate the application and permit it to amend the application so that it complies with Section 22.902(b) is also denied. We agree with the Bureau that it would be inappropriate to permit an applicant, which initially had no right to file, to amend its application to satisfy a qualifying defect, especially when, as discussed above, the filing requirements were quite clear. Were we to reinstate the application, any corrective amendment would be a major amendment. *See* 47 C.F.R. Section 22.23(c)(4). As a result, the application would be treated as newly filed and, thus excluded from comparative consideration. *See* 47 C.F.R. Sections 22.23(g) and 22.31(d). While, under Section 22.23(g)(3), we could waive the cut off rule, under Section 22.31, there is no public interest reason for doing so in this instance because service to the public may be provided through the competing applicant. *Compare Armstrong Telephone Co.*, 3 FCC Rcd 1665 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-87-109

Application for authority to acquire and operate the interests of Comsat International Communications, Inc., MCI International, Inc. and RCA Global Communications, Inc. in the Etam, Jamesburg and Roaring Creek international earth stations and to offer earth station services under tariff to authorized users

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1989; Released: March 13, 1989

By the Commission: Commissioner Dennis concurring in the result.

1. On November 30, 1987, ITT World Communications, Inc. (ITTWC) filed an application seeking Commission review of a Common Carrier Bureau decision that granted the application of the American Telephone and Telegraph Company (AT&T) to acquire and operate the interests of Comsat International Communications, Inc. (CICI), MCI International, Inc. (MCII) and RCA Global Communications, Inc. (RCAGC) in the Etam, West Virginia, Jamesburg, California and Roaring Creek, Pennsylvania multi-purpose international earth stations.[1] On December 3, 1987, FTC Communications, Inc. (FTCC) filed comments supporting ITTWC's application for review. AT&T filed an opposition and motion to strike ITTWC's application and FTCC's comments. ITTWC opposed AT&T's motion to strike. For the reasons discussed below, we affirm the *Bureau Order* and deny ITTWC's application for review.

BACKGROUND

2. AT&T's application to acquire the interests of CICI, MCII and RCAGC in the Etam, Jamesburg and Roaring Creek earth stations was a result of this Commission's decision in the *Earth Station Modification Order*.[2] In that decision this Commission adopted a more flexible earth station ownership policy permitting carriers independently to own and operate U.S. multi-purpose international earth stations that operate with the INTELSAT global communications satellite system. The policy in place prior to that decision had restricted ownership and operation of multi-purpose earth stations to Comsat and those U.S. international service carriers participating in the various consortia of the Earth Station Ownership Committee (ESOC).[3] This Commission found that carrier-owned and -operated earth stations would be technically feasible, would create no major economic hurdles, would not greatly affect our foreign partners in INTELSAT, and would result in lower cost and technically superior service to consumers. Therefore, this Commission concluded that a more liberal earth station ownership policy would benefit users by increasing carrier and service benefits and creating competitive pressures on rates. One of the central issues raised by the transition to a new competitive earth station ownership policy was the appropriate disposition of the ESOC earth station investments. We were particularly concerned about the potential for revenue diversion from the ESOC facilities, should they continue to operate and should AT&T, with its large volume of traffic, seek to construct its own facilities. The *Earth Station Modification Order* permitted the ESOC joint owners to negotiate among themselves the future of the ESOC and then submit an agreement for Commission consideration. We stated our expectation that any arrangements proposed by the ESOC owners would be consistent with antitrust laws and would assure the continuance of efficient, high quality service, without disruption, at reasonable rates and with equitable access.

3. The ESOC owners subsequently have submitted to this Commission a number of applications proposing to implement the dissolution of the various consortia of the ESOC. The Common Carrier Bureau, in a series of decisions over the last year, has granted these applications and effectuated the transition to a more competitive market for the provision of international multi-purpose earth station services.[4]

4. The *Bureau Order*, the second in this series of authorizations,[5] approved AT&T's acquisition of full ownership interests in the Etam, Roaring Creek and Jamesburg facilities.[6] The *Bureau Order* also authorized AT&T to provide indefeasible rights of use (IRUs)[7] in the three earth stations to the former ESOC co-owners, CICI, MCII and RCAGC.[8] The *Bureau Order* found that the proposed arrangements were consistent with the policies this Commission adopted in the *Earth Station Modification Order* and met relevant statutory requirements.[9] The *Bureau Order* also denied ITTWC's petition to deny or condition AT&T's application. ITTWC's petition had asked the Commission to attach a condition to the grant of AT&T's application so as to require AT&T to make IRUs in the earth stations available to all authorized carriers, even though they were not participants in the ownership of the ESOC facilities, and to deny AT&T's application if AT&T were unwilling to implement the condition.[10] ITTWC's application for review urges this Commission to reverse the *Bureau Order*, insofar as it determined that AT&T could offer IRU interests only to the former joint owners of the three facilities, and to require AT&T to offer IRUs to all authorized users.[11]

PLEADINGS

5. ITTWC's application for review, like its pleadings against the AT&T application, characterizes AT&T's provision of IRU capital interests in the former ESOC facilities to the former ESOC co-owners, but not to others such as ITTWC, as patently unlawful discrimination prohibited by Section 201(c)(2) of the Communications Satellite Act of 1962, as amended, 47 U.S.C. Section 721(c)(2), and Section 202(a) of the Communications Act of 1934, as amended, 47 U.S.C. Section 202(a). ITTWC contends that although AT&T is not required to offer IRU interests to any authorized carrier, if it offers IRU inter-

ests to certain authorized carriers, it must offer comparable access to all authorized carriers to comply with the statutory prohibitions against discrimination. ITTWC alleges that the IRU arrangements are substantially more favorable than the provisions of AT&T's earth station services tariff, and, for this reason and because ITTWC's overseas correspondents favor use of the former ESOC facilities, that ITTWC will be competitively injured by the unavailability of IRUs. ITTWC further contends that the *Bureau Order* mischaracterized the IRU capital interests as a continuation of the capital interests held by the former ESOC co-owners in the ESOC facilities. ITTWC asserts that the two capital interests differ because an ESOC earth station interest was simply an investment recovery vehicle, whereas it views an IRU interest as a usage-related investment.

6. ITTWC also contends that the *Bureau Order* relies on an argument that ITTWC's decision to sell its ESOC investment interest in 1981 and TRT's decision not to acquire such an interest somehow estop ITTWC and TRT from claiming a right to acquire an IRU interest in the former ESOC facilities at this time.[12] ITTWC states that its decision to divest its capital interests in the ESOC facilities in 1981, and TRT's decision not to invest, have no bearing on the question of nondiscriminatory access to the facilities at the present time. In this regard, ITTWC urges us to review its petition to deny the AT&T application and subsequent reply. The reply attached the contract of sale governing ITTWC's transfer of ESOC interests to AT&T in 1981. ITTWC asserts that the sales agreement specifically provides that the sales transaction would not prejudice ITTWC's right to such an IRU interest in these earth stations at a later date.[13]

7. Finally, ITTWC asserts that the *Bureau Order* may suggest that an AT&T tariffed rate for earth station services that is higher than the economic cost of providing an IRU would be suspended and that tariff rates comparable with the IRU prices would be required. ITTWC advises that this approach might be an acceptable resolution of the discrimination problem it has outlined, but suggests that such a process would be an administrative nightmare requiring detailed and continuing Bureau involvement in AT&T's rate-setting process.[14]

8. FTCC's comments support ITTWC's application for review. FTCC advises that it also would be competitively harmed by the grant of IRUs to the former ESOC co-owners. FTCC states that it, like TRT, elected not to take an investment position in the ESOC earth stations based on its evaluation of the probable return on investment and the opportunity cost to FTCC of diverting capital from other needs. FTCC asserts that its decision to refrain from such investment should not preclude it from now obtaining access to the earth stations on the same terms as all other users.

9. AT&T responds[15] that ITTWC's reliance on Section 202(a) of the Communications Act and Section 201(c)(2) of the Communications Satellite Act is misplaced. IRU is not a service, but a form of ownership, AT&T states. Thus, AT&T asserts, the statutory prohibition against unjust discrimination in the provision of like services is not applicable to the grant of IRUs in the three earth stations. Even if the like service prohibitions were applicable, AT&T argues, the mere fact that an IRU is sold at a cost that is different from the tariff rate for earth station services does not constitute unjust discrimination. AT&T suggests that ITTWC overlooks significant factors when it concludes that IRU prices are comparatively lower than tariffed rates. First, AT&T states, the one-time IRU price only covers the initial capital costs of the transferred circuits. An IRU purchaser also must pay monthly operations and maintenance costs and is responsible for a pro rata share of any additional capital investments. Second, AT&T advises, the IRU capital investment is a long-term financial commitment with inherent economic risks not present when a carrier leases earth station services on an as-needed basis. AT&T identifies certain of these risks: the time-value of money for the upfront one-time capital contribution as opposed to periodic tariff charges; the possible miscalculation of market demand by the IRU purchaser versus the availability of tariffed services on an as-needed basis; similarly, cash constraints on the IRU holder and uncertain future costs; and technological changes in competitive facilities that could render the IRU investment obsolescent. AT&T also notes that its earth station facilities are not the only such facilities available for access to the INTELSAT system, and that ITTWC has not shown that access via these other facilities is more costly than an IRU in AT&T's facilities or service via AT&T's tariff.

DISCUSSION

10. The *Bureau Order* found that the unconditional grant of AT&T's application to acquire and operate the Etam, Roaring Creek and Jamesburg multi-purpose earth stations was in the public interest. ITTWC asserts that, because AT&T agreed to offer IRU capital interests to CICI, RCAGC and MCII, the Bureau should have conditioned AT&T's grant on a requirement that AT&T also offer IRU capital interests to all authorized carriers. We disagree.

11. The issue before the Bureau in this proceeding was whether the public interest would be furthered by a grant of AT&T's Section 214 application. The Bureau made the requisite public interest findings, and we incorporate those findings here. The *Bureau Order* both found the arrangements set forth in the application to be consistent with this Commission's *Earth Station Modification Order* and concluded that AT&T was qualified to acquire and operate the facilities. Moreover, the *Bureau Order* concluded that there was no public interest rationale for conditioning the application on a requirement that AT&T provide IRUs to ITTWC and TRT. This conclusion flows directly from our decision in the *Earth Station Modification Order*, the purpose of which was to foster independent ownership and operation of multi-purpose earth station facilities. As a result of that decision, there are currently more than a dozen multi-purpose international earth stations in the continental United States, one of which is owned in part by ITTWC. A carrier that does not elect to lease capacity from AT&T or another carrier providing earth station services can seek to construct and operate its own facility.[16] The *Earth Station Modification Order* found that the competitive provision of multi-purpose earth stations would be technically feasible, would create no major economic hurdles, and would result in superior service to consumers. In this market environment, the Bureau was correct in concluding that the public interest did not mandate a condition on AT&T's authorization.[17]

12. In reaching its public interest determination, the Bureau did not have to decide whether AT&T's tariff arrangements resulted in unlawful discrimination. The issue in this proceeding is whether the public interest would be served by a grant of AT&T's Section 214 application. To the extent that ITTWC asserts that the Bureau could not make this determination absent a condition requiring AT&T to offer IRU interests to all authorized carriers, it is in error, for the reasons set forth above and in the *Bureau Order*. As to AT&T's tariff arrangements, even if we were to assume that the discrimination ITTWC alleges exists and is unlawful, it is not necessary or appropriate to address that discrimination in this context.[18] The proper context for deciding such issues is a tariff or complaint proceeding.[19] The relief these parties would be entitled to if they prevailed is a nondiscriminatory tariff rate. It is not necessary that we require AT&T to make IRUs available to all authorized carriers and to do so would be inconsistent with our decision in the *Earth Station Modification Order*.

13. Accordingly, IT IS ORDERED that ITTWC's Application for Review of the *Bureau Order* IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Memorandum Opinion, Order and Authorization, 2 FCC Rcd 6635 (1987) (Bureau Order). In this proceeding, ITTWC had petitioned the Commission to deny AT&T's application and had filed reply comments. TRT had filed comments and reply comments. AT&T had opposed, and CICI had filed a response to, the ITTWC petition and TRT comments. *See infra* para. 4. The Bureau Order also approved the associated Title III applications for authority to assign the radio licenses for the three facilities to AT&T.

[2] Modification of Policy on Ownership and Operation of U.S. Earth Stations that Operate with the INTELSAT Global Communications Satellite System, Report and Order, 100 F.C.C. 2d 250 (1984) (Earth Station Modification Order).

[3] The Commission had adopted these restrictive ownership requirements in 1966, at the time of the scheduled launch of the second transatlantic service satellite, when the immediate construction of additional earth stations became necessary. The joint ownership policy was designed to meet the Commission's dual concerns (1) that centralization of responsibility in Comsat for the design, construction and operation of the additional earth stations would preclude other authorized carriers from participation in earth station ownership during the early years of operation, contrary to the intent of Congress, *see, e.g.*, Senate Report No. 1584, 87th Congress, 2d sess., page 18, but (2) that fragmented responsibility for, and control of, the various components of the then-nascent satellite system could adversely affect its efficiency at a critical point of development. *See* Bureau Order at paras. 2-6. In the sixteen years that followed the Commission's adoption of the joint ownership policy, the dynamic nature of satellite and earth station technologies fostered new services and the development of more efficient satellites and small earth stations. Moreover, INTELSAT's membership base and financial stability had grown significantly since 1966, when our overriding concern had been the successful establishment of a global satellite system. Thus, in 1982 this Commission initiated an inquiry to solicit comments on whether the joint ownership policy still served the public interest, and subsequently instituted a notice of proposed Rule Making in the proceeding. *See* Bureau Order at paras. 7-8. In 1984, we released the decision in the Earth Station Modification Order.

[4] *See* Bureau Order, *supra* n. 1 (approving AT&T's acquisition of Etam, Roaring Creek and Jamesburg facilities); MCI Communications Corp., 3 FCC Rcd 6 (1987) (granting MCI's acquisition of Andover earth station); Comsat International Communications, Inc., 2 FCC Rcd 1167 (1987) (allowing discontinuance of Brewster Flat facility); Comsat Earth Stations, Inc., 3 FCC Rcd 1803 (1988) (allowing discontinuance of Paumalu facility and dissolution of Hawaii Consortium of the ESOC); GTE Spacenet, 3 FCC Rcd 1801 (1988) (authorizing GTE Spacenet to construct and operate the Sunset, Hawaii international facility); RCA Global Communications, 3 FCC Rcd 2814 (1988) (authorizing RCA's acquisition of Pulantat earth station and dissolution of Guam Consortium of the ESOC); American Telephone and Telegraph Company, 3 FCC Rcd 4785 (1988) (authorizing AT&T's acquisition of the Lenox diversity earth station and dissolution of Mainland Consortium of the ESOC).

[5] The first authorization involved the discontinuance of the Brewster Flat facility, 2 FCC Rcd 1167 (1987).

[6] The acquisition was consummated on December 31, 1987. *See* Letter from Shant Harootunian, AT&T to Acting Secretary, FCC (received March 16, 1988).

[7] An IRU interest in a communications facility is a form of acquired capital in which the holder possesses an exclusive and irrevocable right to use the facility and to include its capital contribution in its rate base, but not the right to control the facility or, depending on the particular IRU contract, any right to salvage. The IRU, like other capital investment interests, also can provide certain tax and collateral asset advantages. The holder of an IRU shares in maintenance expenses and any future capital contributions.

[8] AT&T granted IRU interests, effective January 1, 1988, to RCAGC (80 equivalent 4 KHz circuits at Jamesburg) and MCII (156 equivalent 4 KHz circuits at Etam). CICI elected to forego IRUs. *See* Letter from Shant Harootunian, AT&T to Secretary, FCC (received January 19, 1988).

[9] Bureau Order at para. 26.

[10] *Id.* at para. 31. *See also*, para. 15. The Bureau declined to order AT&T to provide IRUs to ITTWC and TRT, which, in its comments, also sought IRUs, noting that the Commission generally views IRU conveyances as voluntary transactions between facility owners and IRU purchasers. The Bureau Order further found that there was no unlawful discrimination in AT&T's provision of IRU capital interests to the ESOC members. The Bureau Order noted that the IRU proposal itself created no unlawful discrimination, but merely allowed the ESOC members to continue their investment interests in the earth station facilities, albeit in a different form. The Bureau Order further stated that the contention of ITTWC and TRT essentially was that they would be charged a tariffed rate that is above "cost," and thus would pay more for earth station services than the IRU purchase price. The Bureau Order found this allegation premature because AT&T had not at that time filed its tariffed rate. The Bureau Order noted that, as a dominant carrier, AT&T would have to cost support its tariffed rates and interested parties would have the opportunity to challenge the tariffed rates as unlawful before the tariff became effective. *See* Bureau Order at paras. 21-25.

[11] In the context of ITTWC's pleadings, it appears that ITTWC is seeking IRUs for those carriers that use AT&T's earth station facilities, and not for the general class of authorized users that may lease earth station capacity pursuant to AT&T's Skynet tariff. ITTWC, in its petition to deny AT&T's application, sought IRUs for authorized carriers. ITTWC's Application for Review states that it seeks IRUs for authorized users such as ITTWC and TRT. We will treat ITTWC's request as seeking IRUs for carriers such as ITTWC and TRT.

[12] The Bureau Order noted that ITTWC, in seeking authorization for the sale of its ESOC capital interests in 1981, had stated that it wished to shift a relatively passive investment in facilities managed and substantially controlled by Comsat to more lucrative investments that ITTWC more easily could manage. The 1981 order approving the sale held that ITTWC voluntarily could exit from ESOC membership just as it voluntarily had entered it. *See* Bureau Order at n. 13. The Bureau Order also noted that TRT, which originally sought ESOC membership in 1981, ultimately elected not to become an ESOC member. *Id.* at n. 40.

[13] Paragraph 9 of the sales agreement states, "This Agreement is made without prejudice to any position that either party heretofore has taken or hereafter may wish to take with respect to any issue relating to communications satellite systems, including, but not limited to, the ownership of or indefeasible right of user or other usage interests in the Earth Stations or other existing or new communications satellite earth stations, in any proceeding which heretofore has been or hereafter may be instituted before any court or regulatory agency and without prejudice to ITT Worldcom's right to utilize services rendered through all such stations (including the Earth Stations) by Comsat, AT&T or any other entity which may hereafter become responsible for such services."

[14] ITTWC also notes that, at the time it filed for review of the Bureau Order, AT&T had filed interim earth station service rates that reflected a continuation of the ESOC tariff rates provided by CICI. Because these interim rates, although previously cost-justified by CICI for all of CICI's earth stations, were not cost-justified by AT&T, ITTWC states that ITTWC could do little to address the comparability issue through the tariff review process until AT&T filed its substantive tariff. AT&T filed its tariff on April 29, 1988, with cost justification, and lowered the tariffed rates for a voice-grade earth segment channel from $387.60 per month to $212.00 per month. The tariff revisions were unopposed, and became effective June 30, 1988.

[15] AT&T's responsive pleading is styled as a motion to strike ITTWC's application for review as untimely and FTCC's comments as an unauthorized filing under Section 1.115 or as an untimely filed application for review, and is also styled as an opposition to ITTWC's and FTCC's pleadings. Although we have considered the procedural arguments set forth in AT&T's and ITTWC's pleadings in our determination, we will not discuss them in detail. Rather, it is sufficient to state that ITTWC's November 30, 1987 application for review, filed within 30 days from the date of public notice of the Bureau Order, which was released October 28, 1987, is timely. *See* Section 1.4(a), (b), (d) and (i) of the Commission's rules, 47 C.F.R. Section 1.4(a), (b), (d), (i) (1987). Under the same section, FTCC's December 3, 1987 pleading would be an untimely application for review. We agree with AT&T that FTCC's pleading, if not treated as an application for review, is a filing that is not contemplated by Section 1.115, 47 C.F.R. Section 1.115 (1987). However, because FTCC's pleading raises no new issues, while allowing a thorough consideration of all views, we have considered its comments in this instance.

[16] Thus, the market environment for international multi-purpose earth station capacity has become increasingly competitive since our decision in the Earth Station Modification Order. In this market environment, we do not agree with ITTWC that grant of an IRU is required under Section 201(c)(2) of the Satellite Act to ensure equitable access to the INTELSAT system. Similarly, the market environment today differs significantly from that that existed during the nascency of the satellite system, when this Commission conditioned the grant of certain mutually exclusive applications for facilities associated with satellite earth stations on a requirement that the grantee provide IRUs in the associated facilities. *See* All America Cables and Radio, Inc., *et al*, 15 F.C.C. 2d 1 (1968) and Communications Satellite Corp., *et al*, 23 F.C.C. 2d 850 (1970), which, in disposing of mutually exclusive applications, conditioned the grant of construction permits and authorizations to operate domestic point-to-point microwave radio stations on a requirement that these facilities be made available to all authorized carriers on an IRU basis, or, at a using carrier's option, on a lease basis, to assure equitable access to the earth stations with which the associated facilities would interconnect. The current market environment generally would not give rise to such mutually exclusive applications.

[17] ITTWC contends that the Bureau Order relies on an "estoppel" argument. We do not construe the Bureau Order to hold that ITTWC and TRT are estopped from ever acquiring IRUs in the former ESOC facilities because they elected to forego participation in ESOC. Rather, the Bureau Order held that ITTWC and TRT cannot claim an entitlement to IRUs. *See supra* n. 10. As discussed below, we need not address the merits of the "estoppel" issue to reach our decision today.

[18] This Commission has the discretion to order its proceedings. By enacting Section 4(j) of the Communications Act, 47 U.S.C. Section 154(j), Congress explicitly delegated to this Commission the power to determine the manner in which its proceedings will be conducted. Nader v. F.C.C., 520 F.2d 182, 195-97 (1975).

[19] ITTWC and other interested parties had the opportunity to challenge the tariffed rates as unlawful before the tariff became effective. Neither ITTWC nor any other party opposed AT&T's April 29, 1988 tariff filing. In reviewing the tariff filing, the Bureau did not find the provisions to be facially unlawful or to present any issues that required suspension and investigation, and the tariff was allowed to become effective on June 30, 1988. ITTWC's decision not to oppose the proposed tariff rates, however, does not foreclose it from all opportunity to argue that the IRU and tariff rates are unlawfully discriminatory. ITTWC may present specific allegations to this effect in a Section 208 complaint filing, 47 U.S.C. Section 208. As a related matter, ITTWC may present specific reasons why, from an operational standpoint, it must be permitted to obtain IRUs in the subject earth stations as opposed to receiving service pursuant to tariff, using the facilities of other carriers or constructing its own facilities. However, ITTWC has the burden of demonstrating that alternative facilities are not substitutable for IRU access to AT&T's facilities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition to Amend the Amateur Service Rules to Authorize Technician Class Operators to Use Emission F1B. RM-6559

ORDER

Adopted: March 2, 1989; Released: March 13, 1989

By the Chief, Private Radio Bureau:

1. On July 11, 1988, Nicholas W. Sayer filed a petition (RM-6559) to authorize amateur stations having a control operator holding a Technician Class operator license to transmit emission F1B (teleprinting)[1] in segments of the 80, 40, and 15 meter bands. The petitioner states that the additional privilege for Technician Class operators would be an incentive for Novice Class operators to upgrade to Technician Class.

2. Section 97.7(a) and (b) of the Commission's Rules, 47 C.F.R. § 97.7(a) and (b), authorizes amateur stations having a Novice Class or Technician Class control operator three small segments of the 80, 40, and 15 meter bands. Section 97.61(d)(1) of the Commission's Rules, 47 C.F.R. § 97.61(d)(1), however, limits stations having Novice or Technician Class control operators to transmission of emission A1A (telegraphy) in these segments.

3. The Technician Class of operators, numbering 98,681 licensees at the end of 1988, is currently the fastest growing of the five license classes.[2] There is no need, therefore, for offering additional incentives for Novice Class operators to upgrade to Technician Class. The opening of these small segments to such a large number of stations for teleprinting, moreover, could have a serious negative impact upon their usefulness in providing an opportunity for Novice and Technician Class operators to improve their telegraphy skills sufficiently to qualify for a General Class operator license. Such a result would be undesirable because the General Class shows the slowest rate of growth.[3] Further, authorization of emission F1B in the small segments of the 80, 40, and 15 meter bands is not justified in light of the fact that Technician Class operators may obtain use of emission F1B on these bands by upgrading to the General Class operator license. Although the Technician Class operator license carries some privileges on the high frequency (HF) bands, it is primarily a license for operation on the very high frequency (VHF) bands and above. The General Class operator license is the first level of the incentive licensing structure that incorporated significant HF privileges. Thus, adoption of the proposal would actually have the negative impact of removing some of the incentive to upgrade from Technician Class to General Class. This would be contrary to established policy goals.

4. This petition for an additional privilege for Technician Class operators does not raise any new or novel matter. IT IS THEREFORE ORDERED, pursuant to Sections 0.331 and 1.401(e) of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.401(e), that the petition to amend Section 97.61(d)(1) IS DENIED. Pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, review by the full Commission of this action, which is taken under delegated authority, may be requested.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] Emission F1B is frequency or phase modulation of a single channel, containing quantized or digital information without the use of a modulating subcarrier, that is used to transmit telegraphy for automatic reception.

[2] For the 12 months ending November 30, 1988, the Technican Class grew by 8.92 percent compared to an overall growth in the number of amateur operators of 1.56 percent.

[3] For the 12 months ending November 30, 1988, the number of General Class operators decreased 1.24 percent.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-65

In the Matter of

Amendment of the Amateur Service Rules Concerning Frequencies Authorized for Automatically-Controlled Stations in Beacon Operation. RM-6512

NOTICE OF PROPOSED RULE MAKING

Adopted: March 6, 1989; Released: March 15, 1989

By the Commission:

I. INTRODUCTION

1. This *Notice of Proposed Rule Making* proposes to amend the Amateur Radio Service Rules to relocate certain beacon operations in segments of the 2 meter (m) and 70 centimeter (cm) bands. This proceeding was initiated by a petition for rule making (RM-6512) filed by The American Radio Relay League, Inc. (ARRL) on September 7, 1988.

II. BACKGROUND

2. Amateur stations in beacon operation (beacons) are used to facilitate the measurement of radio equipment characteristics, the adjustment of radio equipment, the observation of propagation phenomena, or other such experimental activities.[1] Because automatically-controlled beacons transmit continuously, they dominate the channel utilized. Section 97.87(e) of the Commission's Rules, 47 C.F.R. § 97.87(e), therefore, limits this type of beacon to small segments where continuous one-way transmissions can be accommodated.

3. In its petition, ARRL requests that the 2 m band beacon segment be relocated from 144.05-144.06 MHz to 144.275-144.300 MHz, the 1.25 m band segment from 220.05-220.06 MHz to 220.275-220.300 MHz[2] and the 70 cm band segment from 432.07-432.08 MHz to 432.300-432.400 MHz. The ARRL states that it had reviewed the matter of the compatibility of beacons with weak-signal experimenters and with that part of the amateur community generally interested in beacons. The ARRL also states that it concluded that relocating the segments, as requested, would better suit automatically-controlled beacons. The ARRL points out that because the present segments in the 2 m and 70 cm bands are so close to frequencies used for moonbounce and other weak-signal communications, nearby beacons occasionally interfere with weak-signal experimentation.[3]

4. Edker R. Jones, Sr. filed a comment opposing the petition for rule making. He states that removing the current authorized segment in the 1.25 m band for beacons would be a great loss to the amateur service. He argues that beacons in the 220.05-220.06 MHz segment is one of the backbone links between cities, counties and states. In addition, he contends that a loss of moonbounce communications would result.[4]

III. DISCUSSION

5. It appears desirable to relocate the 2 m and 70 cm band segments for automatically-controlled stations in beacon operation. The proximity of continuous transmissions to frequencies where moonbounce and other weak-signal experimentation takes place may result in interference to the latter. Such interference deprives experimenters of the propagation information which they regularly use in their operations. We propose, therefore, to relocate the segments for beacons in the 2 m and 70 cm bands and seek comments on this proposal.

6. We do not propose, however, to change either segment authorized for beacons in the 1.25 m band. The frequencies between 220-222 MHz have been reallocated exclusively to the land mobile service for both government and nongovernment operations[5]. The beacon segment in this part of the 1.25 m band, therefore, will be removed when 220-222 MHz is deleted from the amateur service rules and incorporated into the land mobile service rules. Beacons may continue to transmit in the 220-222 MHz segment until such time as rules are adopted effecting the change. The beacon segment in the 1.25 m band that continues to be allocated to the amateur service is not affected.

IV. PROCEDURAL MATTERS

7. In accordance with Section 605 of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605, the Commission certifies that this rule would not, if promulgated, have a significant economic impact on a substantial number of small business entities because these entities may not use the amateur radio service for commercial radio communication. *See* 47 C.F.R. § 97.3(b).

8. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.*, and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements and will not increase or decrease burden hours imposed on the public.

9. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Commission's Rules, 47 C.F.R. 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* 47 C.F.R. §1.1202(f). During the Sunshine Agenda period no presentations, *ex*

parte or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. *See* 47 C.F.R. § 1.1203.

10. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* 47 C.F.R. § 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See* 47 C.F.R. § 1.1206.

11. Authority for issuance of this Notice of Proposed Rule Making is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r). Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, interested persons may file comments on or before **June 12, 1989,** and reply comments on or before **July 14, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided further that the fact of the Commission's reliance on such information is noted in the Report and Order.

12. In accordance with Section 1.419 of the Commission's Rules, 47 C.F R. § 1.419, formal participants must file an original and five copies of their comments and other materials. Participants who wish each Commissioner to have a personal copy of their comments should file an original and nine copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. Each set of comments must state on its face the proceeding to which it relates (PR Docket Number) and should be submitted to: The Secretary, Federal Communications Commission, Washington, D.C. 20554. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room (Room 239) at its headquarters in Washington, D.C.

13. A copy of this Notice of Proposed Rule Making will be forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations would be amended as follows:

1. The authority citation for Part 97 would continue to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U. S. C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.

2. Section 97.87(e) would be revised to read as follows:

§ 97.87 Beacon operation.

* * * * *

(e) The following amateur frequency bands and emissions are available for automatically-controlled beacon operation: 28.20-28.30 MHz, 50.06-50.08 MHz, 144.275-144.300 MHz, 220.05-220.06 MHz, 222.05-222.06 MHz and 432.300-432.400 MHz using type N/0N, A1A, F1B, or J2A emissions (when type F1B or J2A emissions are employed in these bands, the radio or audio frequency shift, as appropriate, shall not exceed 1000 Hz). Additionally, all amateur frequency bands above 450 MHz are available for automatically-controlled beacon operation using emission types authorized under § 97.61, provided that the licensee is authorized to operate on the frequency under § 97.7.

* * * * *

FOOTNOTES

[1] *See* 47 C.F.R. § 97.3(l).

[2] Section 97.87(e) specifies two segments for automatically-controlled beacon stations in the 1.25 meter band. The ARRL did not request relocation of the 222.05-222.06 MHz segment.

[3] *See* Petition for Rule Making at 2 and 3.

[4] Comments of Edker R. Jones, Sr. at 1.

[5] *See Report and Order*, 3 FCC Rcd 5287 (1988). Petitions seeking reconsideration of the Commission's action in that proceeding are currently pending.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition to Amend Section 97.61(a) of the Commission's Rules to Permit Emission J3E in the 30 Meter Amateur Band. RM-6363

MEMORANDUM OPINION AND ORDER

Adopted: March 6, 1989; Released: March 15, 1989

By the Commission:

I. INTRODUCTION

1. This action denies an application for review of an *Order* [1] by the Chief, Private Radio Bureau denying a petition to amend the amateur service rules to authorize emission J3E (single sideband telephony) in the 30 meter band.

II. BACKGROUND

2. On April 22, 1988, Anthony J. Sivo filed a petition (RM-6363) to amend Section 97.61(a) of the Commission's Rules, 47 C.F.R. §97.61(a), to permit amateur stations to transmit emission J3E in the entire 30 meter band (10100-10150 kHz). The petition was denied by the Chief, Private Radio Bureau on the grounds there is already ample opportunity for high frequency (HF) telephony transmissions in the amateur service, and the need for additional telephony transmissions in the 30 meter band had not been established.

III. PETITION

3. On October 13, 1988, the petitioner filed an application for review[2] reiterating the arguments of the original petition and claiming a procedural error was made by entering comments into the record in violation of Section 1.405(a) of the Commission's Rules, 47 C.F.R. § 1.405(a). The petitioner stated that the comments of Jan C. Clute (Clute) were entered into the record improperly because the petitioner was not properly served with copies of Clute's comments. The petitioner requested that all of Clute's comments that had a direct influence on the decision be stricken from the record.[3]

4. The American Radio Relay League, Inc. (ARRL) filed an opposition to the petitioner's application for review. The ARRL takes issue with the petitioner's premise that his original petition was denied because the 30 meter band is underutilized, noting that it was denied because "the need for telephony transmissions in the 30 meter band has not been established."[4] The ARRL also argues that the 30 meter band is limited to emissions A1A (telegraphy) and F1B (teleprinting) to find a proper balance between development and experimentation on the band and to prevent interference to fixed services stations, the primary users of this small band.[5] Finally ARRL states that the petitioner made no showing that it is desirable to permit telephony transmissions in the 30 meter band, or that the 30 meter band is underutilized, particularly in light of the fact that there is an obligation to avoid interference to stations in the fixed service, the primary users of the 30 meter band.[6]

IV. DISCUSSION

5. Mr. Clute's comments disputed the petitioner's claim that the 30 meter band is underutilized and maintained that the transmission of telephony emissions would destroy the utility of the band.[7] The basis for denying the petition, however, was not the underutilization of the 30 meter band, but rather the lack of a showing of a need for telephony transmissions in the band. Mr. Clute's comments, therefore, did not have a direct influence on the Bureau's decision in this matter. Hence, a technical failure of service of Clute's comments on the petitioner did not result in prejudicial error.

6. We have carefully reviewed the record. There is no showing that the action of the Chief, Private Radio Bureau is in conflict with any statute, regulation, case precedent or established policy. Likewise, there is no showing that the action in question involves a law or policy that has not been previously resolved by the Commission nor that existing policies or precedents should be overturned or revised. The matter of appropriate emissions in the 30 meter band was fully considered and resolved by the Commission.[8] Further, there is no prejudicial procedural error or erroneous finding of fact as to an important or material question of fact. Finally, the application for review merely reiterates Mr. Sivo's original arguments that the 30 meter band is underutilized because of a prohibition on the transmission of telephony in that band. Accordingly, we conclude that the application for review should be denied.

7. Accordingly, IT IS ORDERED pursuant to the authority contained in Section 1.115 (g) of the Commission's Rules, 47 C.F.R. § 1.115(g), and Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that the application for review filed by Anthony J. Sivo IS DENIED.

8. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 3 FCC Rcd 5802 (1988).

[2] Although the petition is entitled "Petition fo Reconsideration" the petitioner requests review by the full Commission pursuant to Section 1.115 of the Rules, 47 C.F.R. §1.115. Application for review of action taken pursuant to delegated authority.

[3] Application for review at 1 and 2.

[4] Opposition of ARRL at 2 and 3.

[5] Opposition of ARRL at 4.

[6] Opposition of ARRL at 9.

[7] Order, *supra*, at 1.

[8] *See* 47 Fed. Reg. 51873 (1982); *see also* 50 Fed. Reg. 18662 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTINGHOUSE COMMUNICATION SERVICES, INCORPORATED — File No. I-T-C-89-024

Application for authority to establish channels of communication between the U.S. and INTELSAT Atlantic and Pacific satellites for provision of INTELSAT Business Services and International Television Service between the U.S. and countries in the Atlantic and Pacific Ocean Regions.

ORDER AND AUTHORIZATION

Adopted: March 6, 1989; Released: March 15, 1989

By the Chief, International Facilities Division:

1. On November 16, 1988, Westinghouse Communication Services, Inc. (WCS), filed the above-captioned application with the Commission requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish and operate channels of communications between the U.S. and overseas points via INTELSAT Atlantic and Pacific Ocean Region satellites for the provision of INTELSAT Business Services (IBS) and international television service. The applicant states that it wishes to use existing earth stations or construct new earth stations for which authority will be sought later pursuant to Title III of the Communications Act. The application was placed on public notice on November 23, 1988. No comments were received.

2. In its application, WCS requests blanket authority to lease from Comsat channels of communication between any existing earth station or any earth station that may be licensed to WCS in the future and appropriate INTELSAT Atlantic and Pacific Ocean Region satellites. WCS states that the channels of communications will be used to provide governmental agencies and business users with digital and analog international satellite communications services for their voice, data and video communications needs. WCS plans to locate international earth stations for which it will seek separate authorization pursuant to Title III of the Communications Act near end user customers, obviating the need for the long terrestrial circuits generally required for connection to existing international earth stations. WCS states that it will be able to provide lower-cost, technically superior, and more secure access to international earth stations than is presently available.

3. After review of the WCS application, we find that its grant will serve the public interest. The applicant requests the same blanket authority to provide IBS services and international television services as we have granted to other carriers.[1] The applicant has the requisite qualifications to provide IBS and international television services to overseas points where such services have been introduced. A grant of the blanket authority requested here would be consistent with the action that we took in previous decisions and can be expected to provide the same public interest benefits.

4. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision by WCS of the IBS and television space segment services between existing earth stations as well as earth stations that are now or may be licensed to them in the future and appropriate INTELSAT satellites.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-89-024 IS GRANTED and WCS is authorized to establish channels of communication between U.S. earth stations and appropriate INTELSAT satellites for the provision of IBS and related digital video services and international television service between the U.S. and those countries that now or hereafter will be listed in Comsat's tariff provisions for the space segment component of IBS or international television service. Provided, however, that this blanket Section 214 authorization is without commitment as to the Commission's action on any Title III IBS earth station applications that the applicant may file in the future.

6. The Section 214 authorization granted herein is effective on the adoption of this order and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

7. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of any necessary operating agreements between the applicant and its correspondents and copies of the agreements shall be filed with the Commission within 30 days of its execution.

8. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

9. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

10. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1987).

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] For IBS services, *see* American Telephone & Telegraph Co., *et. al.*, File Nos. I-T-C-85-052, *et. al.*, Mimeo 3220 (released March 18, 1985), and for international television services, *see* Overseas Telecommunications, Inc., File No. I-T-C-86-163, DA 86-24 (released October 8, 1968).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

Revision of Annual Report Form M

ORDER

Adopted: March 8, 1989; Released: March 15, 1989

By the Deputy Chief, Operations, Common Carrier Bureau:

1. On March 1, 1989, The United States Telephone Association (USTA), in accordance with Part 43 of the Commission's Rules, filed a *Request for Extension of Time* for filing the Annual Report Form M (Form M).

2. USTA's request is a result of the Bureau's current proceeding to revise Form M. This proceeding was initiated by the Chief, Common Carrier Bureau on September 9, 1988, in an *Order Inviting Comments (OIC)* [1] on a complete revision of the Form M. In the *OIC*, it was tentatively concluded that the existing Form M had become obsolete because it does not conform to the new Uniform System of Accounts for Telecommunications Common Carriers. Extensive comments were filed on October 12, 1988, and reply comments were extended to November 4, 1988.[2] The Commission has not yet adopted a final decision on the content and format of the new Form M.

3. Because the Form M is normally due on March 31 of each year and carriers will need time to comply with the new Form M requirements, USTA requests that the Commission grant an extension of the filing date for Form M until 60 days after the release of a final order in this proceeding. USTA states that 60 days would be the minimum time needed for carriers to file the new Form M and states that the Commission generally allows a 90-day period for carriers to comply with amendments to the Form M.

4. The changes proposed in the *OIC* are extensive and the comments suggest a considerable range of proposals for substantially reducing reporting burdens, many of which we may incorporate into a final order. We agree with USTA that carriers will need more time than provided under our current requirements to assimilate the changes and complete the required schedules.

5. Accordingly, IT IS ORDERED, That the date for filing the Annual Report Form M is extended for all carriers until 60 days after the release of an Order in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

FOOTNOTES

[1] Revision of Annual Report Form M, DA 88-1218, released September 9, 1988.

[2] Revision of Annual Report Form M, *Order*, 3 FCC Rcd 6501 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

A. V. LAUTTAMUS, II File No. 20274-CD-P/ML-1-87
d/b/a Beep-Call

For Authority to Construct
new facility in the
Public Land Mobile Service
operating on 454.625 Mhz
at Bridgeport, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 1989; Released: March 15, 1989

By the Acting Chief, Mobile Services Division:

1. Mobilfone Services, Inc. (Mobilfone) has filed a petition to dismiss or deny the captioned application of A. V. Lauttamus, II d/b/a/ Beep-Call (Beep-Call)[1] to construct a base station facility at Bridgeport, Ohio. Responsive pleadings were filed.

CONTENTIONS OF THE PARTIES

2. Mobilfone argues that the Beep-Call application failed to demonstrate that the proposed system has the capability to provide two-way service upon request.[2] In support, it submits the statement of Mr. Mark Staley who states that he called Beep-Call's office to obtain two-way service on Beep-Call's existing station at Weirton, West Virginia but was informed that two-way service was not available for that location. Mobilfone argues that since it is apparent that Beep-Call is not providing two-way service over an existing nearby station, it is reasonable to assume that two-way service will not be offered over the facility requested in the captioned application. Therefore, Mobilfone asserts that Beep-Call's application should be dismissed, citing the Commission's Public Notice on July 15, 1986.[3]

3. In opposition, Beep-Call argues that Mobilfone's allegation that two-way service will not be available at the facility requested in the captioned application is unsupported by an affidavit or sworn statement of someone to support its claim. Beep-Call contends that the unsworn statement of Mr. Staley does not satisfy the requirements of Section 22.30(a)(3) of the Commission's Rules and, as such, must be disregarded. On the other hand, Beep-Call asserts that the exhibits to its application show that the station's facilities are capable of providing two-way service. Finally, Beep-Call maintains that the prohibition against the provision of paging services on a two-way channel was eliminated from the Commission's rules, citing *Public Mobile Radio Service*, 95 FCC 2d 769, 820 (1983).

4. In reply, Mobilfone asserts that Mr. Staley's statement indicating that he could not obtain two-way service from Beep-Call is a sufficient basis from which to make allegations of fact because the Commission's rules no longer require that such allegations be supported by sworn affidavits. In any event, Mobilfone points out that Beep-Call's opposition pleading does not dispute that Mr. Staley could not obtain two-way service from Beep-Call. Mobilfone further asserts that Beep-Call's belief that an applicant may propose to provide paging service over a two-way channel is misplaced and, were the Commission to accept this position, it would result in a *de facto* reallocation of two-way frequencies. Furthermore, Mobilfone contends that Beep-Call's statement that it proposes to utilize a duplexer does not demonstrate that it has the capability of serving a two-way customer. A demonstration of two-way capacity, Mobilfone maintains, should include the type of terminal currently being used, how the wide-area two-way system will control calls, and an affirmative statement that the applicant is providing two-way service or that its proposal is capable of providing such service. Mobilfone concludes that since Beep-Call is currently not capable of providing two-way service and it appears that its objective in filing the application was to offer primarily paging service, the Commission should dismiss Beep-Call's application.

DISCUSSION

5. At the time the above-captioned application was filed, our rules provided that an applicant could apply for frequencies available for two-way service to provide one-way or paging service so long as the two-way service was capable of being offered upon demand.[4] Mobilfone's allegation that Beep-Call is not capable of offering two-way service on demand is based primarily on the statement of Mr. Staley. However, Mr. Staley's statement is not a legally sufficient affidavit under Section 22.30 of the Commission's Rules.[5] In any event, the exhibits to the Beep-Call application demonstrate that it intends to install the equipment needed to provide two-way service.[6] Accordingly, we find that two-way service will be capable of being offered on Beep-Call's system in compliance with Commission rules and policies in effect at the time the application was filed.

6. We find Beep-Call to be legally, technically and otherwise qualified to construct and operate the proposed facility and that the grant of its application is in the public interest.

7. Accordingly, IT IS ORDERED that the captioned application of A.V. Lauttamus, II d/b/a Beep-Call File No. 20274-CD-P/ML-1-87 IS GRANTED.

8. IT IS FURTHER ORDERED that the petition to deny or dismiss filed by Mobilfone Services, Inc. IS DENIED.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Acting Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Beep-Call provides two-way and one-way radio common carrier service in the Weirton, West Virginia area on frequency 454.625, Station KNKI 660.

[2] Mobilfone also alleges that Beep-Call's application failed to disclose the existence of a pending application for a facility within 40 miles of that proposed and that it lacked a public interest statement. These are minor deficiencies which have since been cured by Beep-Call's minor amendment filed contemporaneously with its December 12, 1986 opposition to the petition to deny.

[3] Public Notice, "Requirements to Provide Paging on Two-way Channels in Common Carrier Land Mobile Service," Mimeo No. 5785 (July 15, 1986).

[4] We note that in *Flexible allocation of frequencies in the Domestic and Public Land Mobile Service for paging and other services, First Report and Order,* CC Docket No. 87-120, FCC 89-15 (released February 15, 1989), the Commission recently amended its rules to, *inter alia,* permit licensee's of two-way common carrier channels to offer any type of mobile two-way or one-way mobile service. Under the amended rules, an applicant for conventional two-way mobile frequencies will no longer be required to demonstrate that it is capable of offering two-way service upon demand.

[5] Section 22.30 of the Commission's Rules states that Petitions to Deny must "be supported by affidavit of a person or persons with personal knowledge" of the facts alleged in the petition. In this regard, Black's Law Dictionary, Fifth Ed., defines "affidavit" as follows:

> A written or printed declaration or statement of facts, made voluntarily, and confirmed; by oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation."

Mr. Staley's statement was not taken before a person with authority to administer an oath. Nor does Mr. Staley's statement meet the alternative requirement, described in Section 1.16 of the Commissions Rules, recognizing that the statement is made under penalty of perjury.

[6] Beep-Call's application indicates planned installation of a Celwave PD-526 Duplexer, which would enable Beep-Call to provide two-way service.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-88

In re Applications of

BEREA BROADCASTING CO., INC. File No. BPH-861125MA

MARY R. McGILL File No. BPH-861126MU

For Construction Permit for
New FM Station, Channel 294A,
Berea, Kentucky

Appearances

Timothy K. Brady, on behalf of Berea Broadcasting Co., Inc.; *Jerrold Miller*, on behalf of Mary R. McGill; *Robert Zauner*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
JOSEPH CHACHKIN

Issued: March 2, 1989; Released: March 15, 1989

PRELIMINARY STATEMENT

1. By *Hearing Designation Order*, DA 88-252, released March 14, 1988, the applications of Berea Broadcasting Co., Inc. (BBC) and Mary R. McGill (McGill)[1] were designated for hearing on the following issues:

> 1. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. Pursuant to paragraph 7 of the *HDO*, the Commission ordered that areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, would be considered under the Standard Comparative Issue. BBC and McGill entered into a joint stipulation that there is no decisional difference in the areas and populations proposed to be served by their respective applications, and agree that neither will claim a comparative preference thereby (Jt. Ex. 1).

3. A prehearing conference was held on May 17, 1988, and an evidentiary hearing was held in Washington, D.C., on September 7, 1988. The record was closed on September 7, 1988 (Tr. 207). Proposed findings of fact and conclusions were filed November 7, 1988; replies were filed November 30, 1988.

FINDINGS OF FACT

4. BBC is a corporation organized under the laws of the Commonwealth of Kentucky. Robert J. Spradlin is President, Director and 100% shareholder and Peggy H. Spradlin, who is the wife of Robert J. Spradlin, is Secretary/Treasurer and Director. Mrs. Spradlin does not own any stock in the corporation (BBC Ex. 1).

5. BBC has been the licensee of WKXO(AM), Berea, Kentucky since July 1982. WKXO(AM) operates on 1500 kHz with 250 watts during daytime hours. Robert J. Spradlin serves as General Manager of WKXO(AM). With the exception of its ownership of and connections with WKXO(AM), neither BBC nor any of its officers, directors or its sole shareholder, have any interest in or connection with any other broadcast station or other medium of mass communications. In the event its application is granted, BBC and its principals will divest all interest and connection with WKXO(AM) within three years of the commencement of program tests on the proposed FM station, pursuant to *Memorandum Opinion and Order* (FCC 86-76), MM Docket No. 84-231, adopted February 10, 1986, or at such earlier time as the Commission may specify. In addition, Robert J. Spradlin will terminate his employment and connection with WKXO(AM) (BBC Ex. 1). BBC seeks comparative credit under the Commission's AM Daytime Preference Policy.

6. Between September, 1982 and February, 1987, with the exception of the period of July to September 1982,[2] Spradlin was also employed as general manager at WMST(AM), Mt. Sterling, Kentucky. During this period of time Spradlin devoted a minimum of 30 hours per week to the management of WKXO(AM). While Spradlin does not have detailed time records for this entire period, his records for March, 1986, through February, 1987, reflect that he spent an average of 19 hours per week in the management of WMST(AM) in Mt. Sterling. Throughout this period it was Spradlin's normal practice to spend two nights per week in Berea and to make one day trips on weekends, averaging 4-8 hours per weekend. Although the pattern varied from week to week, he typically would arrive around noon on the first day, work until 11-12:00 p.m., begin work around 6:30 a.m. on the second day, completing his work around 7-8 p.m. and returning to Mt. Sterling. A second overnight stay was often of shorter duration, typically consisting of an afternoon, evening and morning. With the exception of a 7 month period in 1986,[3] Spradlin spent his nights in Berea at the radio station which contained a sleeper sofa, kitchen and bathroom (Tr. 61).

7. Since February 1987, when Spradlin terminated his position with WMST(AM), Spradlin has devoted in excess of 50 hours per week to his duties as General Manager of WKXO, averaging 3 nights per week in Berea, spent at the apartment he has maintained since that time (BBC Ex. 2).[4] His current schedule is to spend the weekend in Mt. Sterling with his family. He would go to Berea on Monday morning, stay overnight Monday, most often Tuesday night, return home (Mt. Sterling) on Wednesday afternoon or evening, return to Berea Thursday morning, stay Thursday night, and usually go back on Friday. If there were sports or special events on the weekend, he would spend an additional night on the weekends in Berea (Tr. 72).

8. Spradlin lives with his wife and son in a house in Mt. Sterling, Kentucky, 45 to 50 miles from Berea, and outside the service area (Tr. 76, 96-97). Mt. Sterling is

listed on Spradlin's driver's license, vehicle registration, and similar documents as his residence. There is no telephone listing in Berea for Spradlin. Spradlin changed his voter registration to Berea in 1987, with the FM hearing a factor in that change (Tr. 72-74). The property tax bill for WKXO's transmitter site is sent to Spradlin's Mt. Sterling address (McGill Ex. 2). In the event, BBC's application is granted, Spradlin and his family will move to Berea and establish full-time residence there, selling their home in Mt. Sterling and purchasing a home within the city limits of Berea, which will be their sole residence (BBC Ex. 2).

9. Spradlin will be integrated into the management and operation of the proposed station on a full-time basis (minimum of 40 hours per week) in the role of General Manager. In his role as General Manager, Spradlin will assume responsibility for supervision of all phases of station operation, including overall supervision of the performance of all station employees in their assigned duties. All management level employees will report directly to him. His duties will also include, but not be limited to, overseeing the continuing ascertainment of community needs and interests and formulating responsive programming to meet those needs and interests; formulating station policy; assuring station compliance with Commission's Rules and Regulations; and effectuating the station's EEO program (BBC Ex. 2). Spradlin has no outside business ventures which would prevent or interfere with his effectuating the above proposal. Spradlin will remain as General Manager of WKXO(AM) until that station is sold. Prior to divestiture of that station, the FM station would duplicate WKXO(AM) almost entirely during WKXO(AM)'s operating hours (Tr. 97; BBC Ex. 2).

10. Spradlin has been a member of the Berea Chamber of Commerce since 1984 and has been a member of its Board of Directors since 1985. He currently chairs the Membership Committee. He has been involved in activities of the Kiwanis Club since 1983, helping to organize, as well as participating in, their radio-television auction for the past 4 years. He also served as auctioneer for the first two years. Spradlin has also served as a speaker for Kiwanis Club meetings, as well as meetings of other civic organizations in Berea.

11. Since 1983, Spradlin has been active in assisting and promoting three (Spring, Summer and Fall) annual craft festivals held in Berea, through promotional campaigns. During 1986-1987 he assisted a local folk dance association in fundraising for the construction of a new Folk Dance - Recreation Center in Berea. He participated in their telethon, serving as one of several on-camera hosts and also assisted this group in the organization and staging of a world record folk dance, which was held during the 1987 Mountain Folk Festival, an annual event sponsored by Berea College (BBC Ex. 2). He recently served as master of ceremonies for the Berea Community High School's 1988 Spring Sports Banquet. In 1986 he organized and provided music for a dance at Berea College, honoring the Berea basketball team for their participation in the national NAIA tournament (BBC Ex. 2).

12. Spradlin attended Eastern Kentucky College at Richmond, Kentucky, and transferred to the University of Kentucky at Lexington, where in 1956 he received a BA, majoring in radio and minoring in journalism (BBC Ex. 2). From 1956 until February 1958, Spradlin was employed at WKOA(AM), Hopkinsville, Kentucky, as an announcer and in sales. From February, 1958, until February, 1962, he was employed at WEKY(AM), Richmond, Kentucky. He began his employment with WEKY(AM) in sales, became Commercial Manager in 1958 and subsequent was promoted to General Manager in 1961. In February, 1962, Spradlin became employed with WWKY(AM), Winchester, Kentucky, as Sales Manager, which position he held until September, 1964. At that time he became employed at WMST(AM), Mt. Sterling, Kentucky, as General Manager. In the late 1960's he became Group Sales Manager for WMST-AM/FM, WFKY-AM/FM, Frankfort, Kentucky, WTRE-AM/FM, Greensburg, Indiana, and WDLR(AM), Deleware, Ohio, four stations then owned by the stockholders of Cardinal Communications. He continued in this position until the late 1970's, when all of the stations were sold, except WMST-AM/FM. Thereafter he continued as the General Manager of WMST, a position which he held until February, 1987. Spradlin and his employer agreed to end the relationship because he was unwilling to curtail his activities at WKXO-AM, formed in 1982, so as to devote more time to the Mt. Sterling station (BBC Ex. 2). As noted, *supra*, since February 1987, Spradlin has devoted himself exclusively to WKXO-AM.

13. BBC will install and utilize auxiliary power generating equipment at both its studio and transmitter sites for the purpose of providing continuous service to the community and service area in the event of power outage or other emergency situation requiring an auxiliary power source (BBC Ex. 1).

Mary R. McGill

14. McGill is an individual applicant. She will work full-time (40 hours per week or more) at the Berea Station as its General Manager. As such, she will be responsible for all aspects of the station's operation, including but not limited to, setting all station policies, hiring and firing personnel, and assuring compliance with all federal and local laws and regulations (McGill Ex. 1). In addition, she will supervise all employees, act as the station's programming director as well as its sales manager, and sell some advertising herself (Tr. 164, 165).

15. McGill was born in Hazard, Kentucky on June 5, 1951. She has lived in Berea since May or June 1980. From December 1978 until she moved to Berea, she lived at Route 3 Copper Creek Road, which is within the service area of the proposed station (Tr. 139-141, 150). After graduating from Hazard High School in 1969, she earned a BGS degree from the University of Kentucky in 1972, with a major in telecommunications (McGill Ex. 1).

16. McGill served as a member of Young People for Nunn for Governor during 1969; worked in the Emberton for Governor campaign during 1973; served as county co-chairperson of Hopkins for Congress in 1982 and in 1984 and 1986 was a member of the Steering Committee for Napier for State Representative (Tr. 181-186). McGill'S involvement consisted of soliciting votes and raising funds for the candidates involved (Tr. 146-147). Since 1983 and up to the present, Ms. McGill has been a Member of the Kentucky State Republican Central Committee. She also held the position of 6th District Chair for Young Republicans in 1983, and was president of the Madison County Republican Women. In 1984, she was Secretary of Madison County Young Republicans and chairperson of the Madison County Republican Party (McGill Ex. 1; Tr. 187, 191-192).

17. Since 1983, McGill has been a member of the Madison County Tax Assessment Board. She receives a small stipend for her services. In 1983, she served as a member of the Board of Directors for the Berea Chamber of Commerce and was chairperson of the Madison County Atheneum (the county library). Also in that same year, she was a member of the Board of Directors and publicity chairperson for the Berea Cancer Society. From 1985 to the present, she has been a member of the Berea Housing Authority and is now vice-chairperson of this organization. She has been a volunteer for the Girl Scout Council from 1986 to the present; has been a 4-H volunteer from 1987 to the present; and in 1988, she ran the gift cart at the Berea Hospital for the Berea Hospital Auxiliary (McGill Ex. 1; Tr. 189).

18. In 1985, McGill was listed among the "Outstanding Young Women in America" and "Who's Who in American Politics". From 1988 to the present, she has been a member of the Berea Lioness Club, and a board member of the Madison County Republican Party. In 1988, she was county chairperson for Kemp for President and currently holds the position of Vice-Governorship in the 6th District Kentucky Republican Women's Club (McGill Ex. 1).

19. McGill has some broadcast and related experience. McGill worked part-time as the evening Weatherperson for WKYH, Hazard, Kentucky, from 1969 to 1970, about 1 1/2 years altogether. In 1977, she became manager at the Frankfort Cable Co., in Frankfort, Kentucky, where she was in charge of production of programming, and hosted an evening news program and a talk show on a cable access channel (McGill Ex. 1; Tr. 140). She supervised high school students in that position, which lasted about nine months (Tr. 153, 204). Since April 1988 up to the present, McGill has been a Client Representative for WEKY, Richmond, Kentucky (McGill Ex. 1). At that position, she devotes about 90% of her time to sales, but she also helps with live remotes and does some production work (Tr. 165). She will resign this position upon grant of her FM application (McGill Ex. 1).

20. McGill will install auxiliary power at her station so as to allow it to remain on the air in the event of a commercial power outage (McGill Ex. 1).

CONCLUSIONS

Diversification

21. Neither applicant suffers a diversification demerit. McGill has no media interests and BBC's principal, Spradlin, has timely pledged to divest his interest in WKXO(AM), Berea, Kentucky.

Best Practicable Service

22. BBC receives 100% quantitative integration credit. Spradlin, BBC's 100% shareholder, will be integrated into the management and operation of the proposed station on a full-time basis in the role of general manager. No evidence has been offered in the record undercutting BBC's entitlement to 100% integration credit.

23. Spradlin lives with his wife and son in a house he owns in Mt. Sterling, Kentucky, 45 to 50 miles from Berea, and outside the service area. Mt. Sterling is listed on Spradlin's driver's license, vehicle registration, and similar documents as his residence. Spradlin did not change his voter registration to Berea until 1987. The FM hearing was a factor in making that change. BBC has been the licensee of WKXO(AM), Berea since July 1982 and Spradlin its general manager during this period. Between September 1982 and February 1987, Spradlin spent two nights a week in Berea. With the exception of a seven months period in 1986 when he shared an apartment with a station employee, Spradlin slept at the radio station on his overnight visits. From February 1987 to the present, when Spradlin terminated his position with the Mt. Sterling station, Spradlin has averaged three nights per week in Berea. During this period, Spradlin has slept in an apartment owned by BBC. Spradlin's part-time Berea residences is of *de minimis* significance. It is fair to say that such sojourns do not significantly further Spradlin's knowledge of or appreciation for, the needs and problems of the service area, the purpose for which the Commission recognizes local residence as an enhancement factor. *See Policy Statement on Comparative Broadcasting Hearings*, 1 FCC 2d 393 (1965); *see also Jarad Broadcasting Company, Inc.*, 1 FCC Rcd 181, 187 (Rev. Bd. 1986). The slight residence credit accorded to BBC for Spradlin's past part-time residence and proposal to establish a full-time residence in Berea pales in comparison, as discussed, *infra*, to McGill's long time Berea residence. Spradlin also receives slight enhancement for his limited civic involvement.

24. The Commission has determined that daytime-only licenses, such as BBC, who apply for FM allotments in their community of license, are entitled to special consideration. In such cases, the value of broadcast experience as an integration enhancement is upgraded "so that it will be equal to the enhancement value of local residence or minority ownership" *In the Matter of Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments, (Second Report and Order)*, 101 FCC 2d 638, 645 (1985). To be entitled to the daytimer preference, the applicant must meet the five prerequisites established by the Commission. The Commission requires that (1) the applicant must have had substantial participation in the management of the daytime-only station;[5] (2) the daytime-only licensee must apply for an FM station in the same community of license as its AM station; (3) the applicant must propose to be integrated in the operation of the FM station; (4) the applicant must own the daytime-only station for three continuous years prior to designation of the hearing for the FM channel; and (5) the applicant must pledge to divest the daytime-only facility within three years from commencement of program test authority on the FM station. *Second Report and Order, supra*, at 645-647; *Memorandum Opinion and Order, supra*, at 1222.

25. BBC and its principal, Spradlin, have satisfied the Commission's requirements. The record establishes that Spradlin has worked more than 20 hours a week in a management capacity at the Berea daytime-only station for the three years preceding the filing of BBC's FM application. McGill's contention that Spradlin has not satisfied the 20 hours per week requirement rests solely on speculation and conjecture and is not supported by the record. In addition, the proposed FM station is in the same community as BBC's AM station. Further, Spradlin has proposed to work full-time at the FM station; BBC has owned the AM station for three continuous years prior to designation of the hearing for the FM channel; and BBC has pledged to divest the AM facility within

three years from commencement of program test authority on the FM station. Therefore, BBC receives an upgraded broadcast experience enhancement equal to local residence or minority ownership.[6]

26. McGill also receives 100% quantitative integration credit. McGill's position as general manager is recognized as a policy making role. The record is devoid of any evidence undercutting McGill's entitlement to 100% integration credit. The fact that Ms. McGill may perform some non-managerial functions, in addition to her managerial duties, does not preclude the award of full-time integration credit. *See Debra D. Carrigan*, 100 FCC 2d 721, 726 (Rev. Bd. 1985, *review denied*, 104 FCC 2d 826 (1986). Similarly, the lack of broadcast experience, even if true, would not bar the award of integration credit. *See Family Broadcasting Group*, 91 FCC 2d 771 (Rev. Bd. 1983). It is manifestly clear that Ms. McGill will be in charge of her station, setting policy, and managing it. Her integration proposal will be credited.

27. McGill is entitled to substantial local residence enhancement credit for her long-term residence in the city of license and earlier residence in the service area. The record establishes that McGill has been actively involved for a number of years in civic and community activities. She has served in a leadership role in many of these organizations. BBC's attempt to minimize McGill's civic involvement is rejected. Her record of performance in these civic and community organizations justifies the award of substantial civic participation credit. McGill also receives substantial gender credit for 100% female ownership and participation in the proposed FM station. Finally, McGill's broadcast and broadcast related experience warrants slight credit for broadcast experience.

Auxiliary Power

28. Since both applicants receive credit for their auxiliary power proposals, neither is entitled to a preference on this factor.

Comparative Summary

29. The applicants are equal under the diversification criterion. Also both receive a quantitative integration score of 10.000. Assuming they were the sole factors, BBC's upgraded broadcast experience enhancement and slight local residence credit would edge out McGill's substantial local residence credit. However, McGill also receives substantial gender credit. Although credit awarded for female participation is less than that accorded minority participation, it is, nevertheless, a highly significant factor. *See North Carolina Radio Service*, 92 FCC 2d 621 (Rev. Bd. 1982), *review denied* FCC 83-211, adopted April 27, 1983. Also, McGill's civic participation is significantly superior to that of BBC. Finally, McGill has also received slight credit for broadcast experience. These additional enhancing attributes of McGill's integration proposal coupled with McGill's enhancement credit for local residence outweigh BBC's enhancement entitlements. Therefore, McGill's application will be granted.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[7] the application of Mary R. McGill for a construction permit for a new FM station on Channel 294A in Berea, Kentucky IS GRANTED, and the application of Berea Broadcasting Co., Inc. for a construction permit IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] The applications of Richard L. Plessinger, Sr., Bradley Scott Park and Edgar Wallace d/b/a The Wallace Company, which were also designated for hearing, have been dismissed. *See, Orders*, FCC 88M-1017, released April 7, 1988; FCC 88M-1349, released May 5, 1988.

[2] When Spradlin acquired WKXO(AM), the grant was conditioned on his withdrawal from station WMST because of potential overlap of the two stations. After Spradlin established there was no overlap, the condition was removed and he resumed his position with WMST(AM) (Tr. 62-63).

[3] Between March and October 1986, Spradlin shared an apartment in Berea with another employee of the station. Spradlin left the apartment when the employee's daughter moved into the apartment with him (Tr. 57).

[4] In February 1987, Spradlin relocated WKXO(AM)'s studios to a building which BBC leased and subsequently purchased, which contains two apartments. Spradlin has kept one of the apartments and lives there on his visits to Berea (BBC Ex. 2).

[5] "Substantial participation" requires a showing "that members of the entity holding cognizable ownership interests spent more than 20 hours per week (either individually or in the aggregate) participating in the management of the daytime-only facility during the three-year period". *FM Channel Assignments (Increased Availability), (Memorandum Opinion and Order)* 59 RR 2d 1221 (1986).

[6] BBC's claim that it is entitled to additional credit for Spradlin's broadcast experience is rejected. The sole effect of the daytime preference is to elevate the value of broadcast experience from a minor enhancement to the equivalent of local residence or minority ownership. The Commission did not intend for applicants to receive two separate credits for broadcast experience, as BBC seeks.

[7] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-173

In re Applications of

COASTAL BROADCASTING PARTNERS, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPCT-851206KE
CATALINA 54 BROADCASTING, LTD. A CALIFORNIA LIMITED PARTNERSHIP	File No. BPCT-860207KJ
AVALON, CATALINA BROADCASTERS, INC.	File No. BPCT-860210KE
ES POSIBLE MINORITY MEDIA TELECOMMUNICATIONS, INC.	File No. BPCT-860210KH
CHRISTINE E. SHAW	File No. BPCT-860210KI
GOLDEN SHORES BROADCASTING, INC.	File No. BPCT-860210KJ
PATRICK D. SISNEROS d/b/a CATALINA BROADCASTERS	File No. BPCT-860210KK
ISLAND BROADCASTING LIMITED PARTNERSHIP, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPCT-860210KM
AVALON BROADCASTING	File No. BPCT-860210KN
DAVID H. WAGNER d/b/a DHW COMMUNICATIONS	File No. BPCT-860210KO

For Construction Permit
Avalon, California

APPEARANCES

Donald J. Evans, and *John M. Shoreman*, on behalf of Coastal Broadcasting Partners, A California Limited Partnership; *Irving Gastfreund*, on behalf of Catalina 54 Broadcasting, Ltd., A California Limited Partnership; *Vincent A. Pepper*, and *Barbara R. Merlie*, on behalf of Avalon, Catalina Broadcasters, Inc.; *Ernest T. Sanchez*, *Georgia H. Burke*, and *Lisa E. Kopf*, on behalf of Es Posible Minority Media Telecommunications, Inc.; *Thomas L. Root*, *Lorretta K. Tobin*, and *Cary S. Tepper*, on behalf of Christine E. Shaw; *Lee D. Andrews*, on behalf of Golden Shores Broadcasting, Inc.; *Dan J. Alpert*, and *Richard B. Quinn*, on behalf of Patrick D. Sisneros d/b/a Catalina Broadcasters; *James A. Gammon*, *A. Wray Fitch III*, and *Diane H. Ming*, on behalf of Island Broadcasting Limited Partnership, A California Limited Partnership; *Benjamin Perez*, on behalf of Avalon Broadcasting; *Dennis F. Begley*, and *Cheryl A. Kenny*, on behalf of David H. Wagner d/b/a DHW Communications; and *Y. Paulette Laden*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
EDWARD LUTON

Issued: March 3, 1989; Released: March 15, 1989

I. PRELIMINARY STATEMENT

1. This proceeding was designated for hearing by *Hearing Designation Order* (Mimeo MM-4416, released May 13, 1986). Originally, the ten captioned applications were designated for hearing, together with two additional applications filed by Catalina Television Partners (File No. BPCT-860210KL) and Parker TV Broadcasting, Inc. (File No. BPCT-860207KI). Those two applications were dismissed by *Orders* of the Presiding Judge (FCC 87M-1161 and FCC 86M-3459) released May 22, 1987 and November 26, 1986, respectively.

2. The issues specified in the *Hearing Designation Order* (with references to Catalina Television Partners and Parker TV Broadcasting, Inc. omitted) are as follows:

> 1) To determine with respect to Catalina 54 Broadcasting, Ltd., Christine E. Shaw, Golden Shores Broadcasting, Inc. [and] Catalina Broadcasters, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.
>
> 2) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 3) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

Summary decision was rendered in favor of Catalina Broadcasters on Issue 1 by *Order*, FCC 86M-3492, released December 1, 1986. Issue 1 was also resolved in favor of Es Posible by *Order*, FCC 87M-391, released February 23, 1987. In addition, summary decision was rendered in favor of Catalina 54 Broadcasting, Limited, on Issue 1 by *Order*, FCC 87M-3366, released December 28, 1987.

3. By *Memorandum Opinion and Order*, FCC 87M-1467, released June 29, 1987, the following issues were added against Christine E. Shaw:

4) To determine whether Christine E. Shaw is financially qualified to construct and operate her proposed station;

5) To determine whether Christine E. Shaw was lacking in candor with the Commission, or engaged in misrepresentations of fact to the Commission, in certifying her financial qualifications; and

6) To determine in light of the evidence adduced pursuant to the foregoing issues, whether Christine E. Shaw is qualified to become a Commission licensee.

4. A pre-hearing conference was held on July 14, 1986. Hearing sessions were held February 23, 24, 25, 26 and 27, 1987, March 2, 3 4, 5, 9, 10, 11, 12 and 13, 1987, and January 5, 6 and 7, 1988. The record was closed on January 7, 1988 (Tr. 3436). The record was reopened by *Order*, FCC 88M-359, released February 11, 1988, in order to receive portions of Avalon Broadcasting's Exhibit No. 6 and was again closed on that date. Proposed findings of fact were submitted by the parties on April 18, 1988, and reply proposed findings on May 10, 1988.

II. FINDINGS OF FACT

Coastal Broadcasting Partners

5. Coastal is comprised of two general partners and one limited partner:

Ray Lee: General Partner, 5.1% ownership interest, 51% of vote.

Rafer L. Johnson: General Partner, 4.9% ownership interest, 49% of vote.

Broadcast Enterprises, Inc.: Limited Partner, 90% ownership interest, 0% vote.

Coastal's State of California "Certificate of Limited Partnership" is dated May 2, 1986, and was filed with the California Secretary of State's office on May 27, 1986. (Catalina Broadcasters Ex. 2, 3). Broadcast Enterprises, Inc. (BEI), the limited partner of Coastal, is a corporation organized under the laws of the State of Delaware. Douglas B. McFadden and Donald J. Evans, attorneys for Coastal, are stockholders of limited partner BEI. (Tr. 133, 230, 276).

6. Lee first met N. Richard Miller, the President of BEI, in the early part of 1985. (Tr. 75-76). Lee testified that he was introduced to Miller because of Lee's interest in applying for an FM radio station in Reno, Nevada. Lee and Miller applied for the Reno license on July 12, 1985, as principals of a limited partnership known as Reno FM Services Partners Limited (Reno FM). (Coastal Ex. 5; Tr. 79, 135, 225). Lee is the sole general partner of Reno FM. Connecticut Corridor Cellular Communications (CCCC) is the limited partner. N. Richard Miller is a shareholder, director, and president of CCCC.

7. Lee and BEI initially were the only two parties to the Coastal Limited Partnership Agreement, dated and entered into on December 4, 1985. (Tr. 109; Coastal Ex. 1). Lee's capital contribution to Coastal was $1,000 in cash. BEI took a 90% equity position in the limited partnership in return for its contribution of $3,000 cash as its initial capital contribution. BEI is obliged to provide up to $200,000 prior to the granting of the license, and an additional $250,000 thereafter. (Tr. 146; Catalina Broadcasters Ex. 2).

8. On or about January 28, 1986, Mr. Rafer L. Johnson entered the limited partnership as a general partner by amendment of the originally executed agreement. (Tr. 85-86, 297). The Certificate of Limited Partnership, however, was not amended by a formal filing with the State of California until May 27, 1986. (Tr. 102; Catalina Broadcasters Ex. 2). The amended limited partnership agreement was also filed at that time.

9. The "B" cut-off date was March 31, 1986. The California Revised Limited Partnership Act requires a Partnership Agreement and the filing of a Certificate of Limited Partnership, and provides that the partnership is formed at the time the Certificate is filed in the office of the Secretary of State. (Catalina 54 Ex. 8).

10. Lee has 51% control over the business affairs of the limited partnership. (Tr. 142). Johnson has 49% control. (Tr. 142). In the case of any disagreement, Lee's decision would prevail by virtue of his greater equity interest.

11. Lee proposes to work full-time (40 hours per week) as General Manager of the proposed station. (Coastal Ex. 2). He will have general oversight responsibility for all of the station's affairs.

12. Mr. Lee is presently employed as an operations manager for the Landmark Thrift and Loan Association in San Diego, California. (Coastal Ex. 2). He will relinquish his current employment to assume his duties at the proposed station. Lee holds a Juris Doctorate from California Western School of Law and a Bachelors in Economics from Claremont McKenna College. (Coastal Ex. 2).

13. Lee is an Asian American of Chinese extraction. He spent four years at Claremont McKenna College which is located within the service area of the proposed station. (Coastal Ex. 2). Lee also lived and worked within the proposed service area in 1981-82. Although he presently resides in San Diego, Lee has been active in the Claremont McKenna College Alumni Association which performs charitable services within the proposed service area.

14. Mr. Johnson proposes to work full-time (40 hours per week) at the proposed station as Director of Programming. (Coastal Ex. 3; Tr. 303-04. Tr. 331). He will also be responsible for hiring and firing of station personnel and personnel practices, including EEO compliance. (Coastal Ex. 3; Tr. 69. 317).

15. Mr. Johnson is a former World and Olympic record holder in the decathalon, and won a gold medal in the Summer Games of 1960 and a silver medal in the Games of 1956. (Coastal Ex. 3).

16. Johnson served on the Board of Directors of the Los Angeles Olympic Organizing Committee. He has been awarded the following honors in the course of his career:

Athlete of the Year - Sports Illustrated

Sportsman of the Year - Sports Magazine

Helms All Athlete of the Year, North America

Sullivan Award - 1960 as outstanding amateur athlete in U.S.

Junior Chamber Award, as one of the ten outstanding men in the U.S. - 1960

California Associated Press Athlete of the Year - 1955 and 1960

Pan American Games Olympic Gold Medal Winner, 1955

Elected to Black Athletes Hall of Fame - 1974

Elected National Track and Field Hall of Fame -1974

Recipient of Horatio Alger Award - 1983

17. Johnson presently operates his own public relations firm and performs a number of compensated, promotional activities. (Coastal Ex. 3; Tr. 308). These commercial, promotional activities will be terminated prior to the assumption of his duties at the proposed station. (Coastal Ex. 3; Tr. 308).

18. Mr. Johnson is a black male. He has resided within the proposed service area for more than 20 years. (Coastal Ex. 3). He will continue to reside in the service area when he assumes his duties at the proposed station. He has more than 20 years of experience in broadcasting. Mr. Johnson produced a daily sports program for KDAY, Santa Monica. (Tr. 308-09). From 1964-1968, he was a full-time sports anchor for KNBC in Los Angeles. Before and since that time, Mr. Johnson has been involved in special events coverage for NBC, ABC, and the Turner Broadcasting Network.

19. Mr. Johnson is president of the California Special Olympics. He was a member of the Los Angeles Olympic Organizing Committee and presently serves its successor organization, the Los Angeles Athletic Foundation, which is involved in the disbursement of funds to youth groups within the Los Angeles area. Additionally, Johnson serves on the Board of Trustees of the UCLA Alumni Association Foundation.

20. He is a member of the Board of Directors of the Kennedy Foundation; a member of the National Advisory Board of the U.S. Association for Blind Athletes; and a member of the Board of Trustees for the National Recreation Park Association. In addition, Johnson has been appointed to positions in the following charitable organizations:

Board of Trustees - Freedom Foundation

Board of Advisors - Presidential Classroom for Young Americans

Committee Member - Presidents Commission on Olympic Sports

Board of Directors - Close-up Foundation

Board of Directors - United States Athletic Foundation

Honorary Chairman - Muscular Dystrophy Association, Central Valley Chapter

21. Mr. Johnson states that he will withdraw from those charitable organizations which interfere with his work at the proposed station. (Tr. 332-33).

22. Neither Coastal nor its general or limited partners have any ownership interest in any medium of mass communications.

Catalina 54 Broadcasting, Ltd.

23. Catalina 54 is a limited partnership organized under the laws of the State of California and has the following structure (Catalina 54 Ex. 1, pp. 1-2; Catalina 54 Application, Section II, Table I):

Name	Position	Ownership
Catalina Communications Corporation Beverly Hills, CA	General Partner	20%
Robert S. Billingsley Encino, CA	Limited Partner	26.66%
Kenneth L. Miller Woodland Hills, CA	Limited Partner	26.66%
Sandra B. Brown Tarzana, CA	Limited Partner	26.66%

24. Catalina Communications Corporation (CCC) is a California corporation, the officers, directors and stockholders of which are as follows:

Name	Position	Ownership
Gordon Peppars Houston, Texas	President, Director	100% (VS)
Reynaud E. Moore Los Angeles, CA	Secretary/ Director	20% (N-VS)
Duane A. Johnson Santa Monica, CA	Treasurer, Chief Financial Officer, Director	20% (N-VS)
Carl C. Poston Los Angeles, CA	Vice President, Director	20% (N-VS)
Richard A. Barlow, Jr. Playa Del Rey, CA	Vice President, Director	20% (N-VS)
James Stewart, Jr. Van Nuys, CA	Vice President	20% (N-VS)

25. CCC has one class of stock with two series -- A and B. Series A stock is voting stock and Mr. Peppars owns 100% of such stock. Series B stock is non-voting stock and the remaining CCC shareholders own all of the outstanding shares of such stock. (Catalina 54 Ex. 1, p. 1; Catalina 54 Application, Ex. 1). As shown in the table, all but one of the non-voting shareholders is a director of CCC and all five of the non-voting shareholders are officers of the corporation. As of the "B" cut-off date in this proceeding, March 31, 1986, those individuals held those positions as officers and directors of CCC. (Tr. 707-08).

26. CCC's Bylaws empower its Board of Directors to "[manage] the business and affairs of the Corporation . . . ." (Catalina 54 Ex. 1, p. 54). While the Board may delegate such authority to "a management company or other person." (*Id.*) " . . . the business and affairs of the Corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the Board of Directors." *Id.* When asked on cross-examination whether as president of CCC and as proposed general manager of the station he would seek the advice of the other officers and directors of CCC, Mr. Peppars stated that he would. (Tr. 519). Mr. Peppars has known all of the other officers and directors of CCC for more than one

year, and he has known Mr. Duane Johnson since 1971 (Tr. 470), and considers all of those individuals his friends. (Tr. 722).

27. Peppars testified that the reason for CCC's five-member Board was to prevent a deadlock in voting (Tr. 469). He also testified that if he had a policy that he wanted to implement, and if the Board of Directors disagreed, he would vote to remove the Board and to implement his policy (Tr. 661).

28. There has been some involvement by some of the non-voting shareholders of CCC in the affairs of Catalina 54, the applicant. For example, Duane Johnson, the "chief financial officer," is authorized to write checks on behalf of both CCC and Catalina 54. (Tr. 380). Indeed, both CCC's and Catalina 54's checking accounts require the countersignature of at least one officer beside Mr. Peppars. (Tr. 55, 575-76).

29. Moreover, both Reynaud Moore and Duane Johnson were involved in developing Catalina 54's business plan. (Tr. 539, 729). Mr. Moore also participated in formulating Catalina 54's programming proposal (Tr. 542), and Carl Poston participated in the formulation of the limited partnership agreement. (Tr. 544).

30. Gordon Peppars, president and director and sole voting stockholder of CCC, the general partner of Catalina 54, proposes to be the full-time general manager of the proposed television station, devoting at least 40 hours per week on a regular basis, at least eight hours per day, to that position. (Catalina 54 Ex. 3, p. 1). As general manager, Mr. Peppars proposes to oversee the operations and manage on a day-to-day basis the business and affairs of the television station. Sales, programming, operations, engineering, public affairs and news personnel will report directly to Mr. Peppars.

31. Mr. Peppars was born and raised in Los Angeles. In 1975, he received a B.A. in Political Science and Economics from UCLA. In November 1985, Mr. Peppars moved to Houston, Texas; however, he intends to assume residence in Avalon in the event of a grant to Catalina 54.

32. Mr. Peppars has been involved with the broadcast industry since 1976. From November 1976 through May 1980, Mr. Peppars was employed by Grey Advertising as an account executive and was responsible for the design and implementation of advertising and marketing plans for Canada Dry in the western United States, including the purchasing of radio time. From May 1980 through February 1984, Mr. Peppars was employed as an account executive for Blair Television, a national radio and television spot representative firm. Mr. Peppars acted on behalf of 34 Blair-represented ABC stations nationwide in the sale of broadcast time to advertising agencies and their clients. From February 1984 through November 1985, Mr. Peppars was employed as a sales account executive with television station KABC-TV, Los Angeles, California. Mr. Peppars was primarily responsible for KABC-TV's local spot advertising in Los Angeles.

33. Mr. Peppars has been the national sales manager for television station KHOU-TV, Houston, Texas. There, he was responsible for the national advertising spot television revenue for KHOU-TV and was involved in the management of that station.

34. Mr. Peppars has been active in civic affairs in the Los Angeles area. He was the co-founder of the Southern California Media Network Association, a professional trade organization geared towards minorities and women in the Los Angeles advertising community. He was also the former president of the Southern California Media Network Association from 1981 through 1985. Mr. Peppars was a member of the Los Angeles Urban League from 1984 to 1986, and since 1985 has been a member of the Black Media Coalition in the Houston, Texas chapter. Moreover, Mr. Peppars is a former member of the ABC Black Employees Association, Los Angeles chapter; he is also a member of the UCLA Black Alumni Association (1984 to the present), and was named one of the outstanding young men of America in 1985. Upon grant of Catalina 54's application and upon Mr. Peppars' return to California, he proposes to resume his active involvement in the Los Angeles chapters of these associations.

35. Mr. Peppars is a black American. In June 1987, Mr. Peppars commenced employment at Station WLS-TV, Chicago, Illinois, as its national sales manager. "Amendment," filed April 15, 1988. Peppars pledged to relinquish this position should Catalina 54 be granted this license. Catalina 54 has no interest in any medium of mass communications; (Catalina 54 Ex. 2, p. 1).

Avalon, Catalina Broadcasters, Inc.

36. Avalon Catalina Broadcasters, Inc. (ACBI) is a California Corporation having two classes of stock, Class A and Class B. Its officers, directors and shareholders are as follows:

Name and Residence	Office Held	Director	Stock Ownership	% EQ.
Oscar L. Nunez 13117 Carolyn Street Cerritos, CA 90701	President, Chief Executive Officer, Chief Financial Officer & Treasurer	Yes	3,000 Shares Series A Stock 30% VS	6%
Catherine M. Ponce A-4 Tremont Street Avalon, CA 90704	Secretary & Vice President	Yes	5,000 Shares Series A Stock 50% VS	10%
Robert C. Ponce A-4 Tremont Street Avalon, CA 90704	--	Yes	2,000 Shares Series A Stock 20% VS	4%
Edmund Ponce 145 Anned Drive Placentia, CA 92670	--	No	2,500 Shares Series B Stock	5%
Hispanic FM Broadcasters, a California	--	No	37,500 Shares Series B Stock	75%
				100%

Limited
Partnership
446 East
Common-
wealth Ave.
Fullerton,
CA 92632

(ACB Ex. 2, Tr. 1344-1345).

37. Article IV of the ACBI Articles of Incorporation states that "the holders of shares of Series A shall have and possess the exclusive right to notice of shareholders' meetings and the exclusive voting rights and power, and the holder of Series B shall not be entitled to notice of any shareholders' meetings, or to vote upon the election of directors, or upon any other matters." (ACB Ex. 2, p. 4).

38. Oscar L. Nunez is President, Chief Executive Officer, Chief Financial Officer, a Director and 30% owner of the voting stock of Avalon, Catalina Broadcasters, Inc. He will devote full-time (at least 40 hours per week) as the General Manager of the proposed station. In that position, he will have the responsibility for the institution and implementation of all policies and procedures on a day-to-day basis regarding the entire operation of the proposed station. All employees at the station will be under his supervision. (ACB Ex. 3).

39. Mr. Nunez is an Hispanic male and has resided within the proposed service area since February 1964. He presently resides at 13117 Carolyn Street, Cerritos, CA 90701, which is within the 80 dbu (city grade) contour of the proposed station. Mr. Nunez intends to move to the community of Avalon upon a grant of the television construction permit.

40. At the time the Avalon, Catalina application was filed, Nunez was General Partner of Hispanic FM, the non-voting Series B, 75% equity holder. At that time, he had no voting stock in Avalon, Catalina. (Tr. 1260). Francisco Firmat was the other General Partner of Hispanic FM.

41. Sometime in March 1986, Mr. Nunez called Catherine Ponce to inquire whether he could discuss with her the possibility of his joining Avalon, Catalina Broadcasters, Inc. as a third officer, director, and voting stockholder. He explained to Ms. Ponce that he would divest himself of all interest in Hispanic FM Broadcasters in order to join her and Robert Ponce. On March 24, 1986, the details were worked out, and he became a voting shareholder effective March 26, 1986. (ACB Ex. 3).

42. Catherine Ponce is Vice President, Secretary, a Director and 50% owner of the voting stock of Avalon, Catalina Broadcasters, Inc. She will devote her full time (at least 40 hours per week) as the Public Affairs Director of the proposed station. In this position, she will have the responsibility for the selection and development of public service projects, public service announcements and public service programming. She will have under her direct supervision at least two full-time employees. (ACB Ex. 4).

43. Ms. Ponce is an Hispanic female and has lived continuously within the community of Avalon, California all of her life. She intends to remain in residence in the community of Avalon upon a grant of the television construction permit.

44. Ms. Ponce first learned of the availability of the Avalon, California UHF television allocation from Francisco F. Firmat, the other General Partner of Hispanic FM Broadcasters. At the time that Avalon, Catalina Broadcasters filed its application, it was Ms. Ponce's intention to try to have a third active participant in the project -- someone with extensive business experience. (ACB Ex. 4). Firmat suggested his partner in Hispanic FM, Oscar Nunez, as the third voting shareholder. (Tr. 1015, 1123-24). It was not until sometime in March 1986 that Nunez approached Ms. Ponce about the possibility of joining her and Robert Ponce as a third active participant. To complete the details of bringing Oscar Nunez in as a third officer, director and voting stockholder, a meeting was held at the offices of Avalon, Catalina's corporate counsel on March 24, 1986. Nunez transferred from General Partner of non-voting shareholder Hispanic FM to voting shareholder effective March 26, 1986. (ACB Ex. 3).

45. Robert C. Ponce is a director and 20% owner of the voting stock of Avalon, Catalina Broadcasters. He proposes to work at the station full-time as its Local Sales Manager. In this position, he will have the responsibility for the hiring and supervision of the station's local sales staff. He will also have responsibility for establishing sales projections, sales goals and pricing policies. He will have under his direct supervision at least two employees. (ACB Ex. 5). As "local" sales director, it will be Mr. Ponce's responsibility to direct sales on Catalina Island itself. (Tr. 760). He intends to be involved in the selling of commercial time for the station (Tr. 782-783). He intends to spend "fair amounts" of his time making sales. (Tr. 783). "A lot" of his 40-hour work week will be spent reading, "study[ing] up on sales". (Tr. 797). Although his written testimony states that he will have at least two employees under his direct supervision, he "doesn't yet know" whether he will initially be the only one working in local sales (with others added later as necessary) or whether there will be three people in local sales right away when operations begin. (Tr. 804). He has never discussed with anyone the number of employees he will supervise. (Tr. 1004).

46. Robert Ponce is an Hispanic male. He has continuously resided within the community of Avalon, California since April 1960 and intends to remain a resident of Avalon upon a grant of the television construction permit.

47. Mr. Nunez was a member of the Junior Executives Club, a mens' community service organization. In 1969, he participated in fundraising and community service events to help the needy in the community. In 1980, he was President of the Cuban Association of Orange County. In that position, he assisted the Mariel boatlift of Cuban refugees and sponsored the Cuban Businessmens' Banquet.

48. Mr. Nunez was a teacher for the ABC Unified School District, adult education, teaching English as a second language in 1976. In 1979, he assisted a Mexican immigrant with the start of a business enterprise. In 1980, he assisted in the formation of the Cuban Assistance Commission. The purpose of this Commission was to assist refugees and former political prisoners. Mr. Nunez served as a member of the Finance Committee, ABC Unified School District, in Cerritos, California in 1986, and was asked to continue in that position in 1987.

49. Mr. Nunez served as an assistant coach of the community youth baseball team, and Nunez & Nunez, C.P.A.'s (his accounting firm), served as treasurer of the parent-teacher organization at St. Pius V School, Buena Park, California, and as a member of the accounting committee for the "Jogathon" at St. Pius V School. Mr. Nunez was a member of the community congressional committee for Bob Dornan, U.S. Congressman, 38th District, California, 1986. Mr. Nunez presently owns his own accounting business. He will divest himself of that business and will have no further involvement in it upon a grant of the construction permit.

50. From 1975 through 1979, Ms. Ponce assisted with the Avalon Junior/Senior High School PTA carnivals. During the years 1974-1975, she assisted with benefit dinners at St. Catherine's Catholic Church in Avalon. While a student at Avalon Junior/Senior High School, she was a student aide. In 1985 and 1986, she was a coach for Dodie's Country Kitchen softball team and she assisted in the fundraising efforts for the Avalon Women's Softball League during the years 1985 and 1986. During the years 1978 and 1979, Ms. Ponce participated in the Solomans Landing Baseball Team. In 1977, she participated in the Tom Cats Baseball Team. In 1982, she participated in the Avalon Sheriff's 10K Fundraising Run. (ACB Ex. 4).

51. Ms. Ponce is presently employed at the Hotel Villa Portofino in Avalon. She will resign from that position in order to assume the position of Public Affairs Director at the proposed station once the construction permit is granted. Previous to her employment at Hotel Villa Portofino, she was employed by the Island Express Helicopter Service during the time period in which helicopter service was inaugurated between Avalon and Long Beach. In that position, she was responsible for managing the Avalon office of the Island Express Helicopter Service and for the hiring and supervision of several employees.

52. Mr. Ponce has actively participated in the following civic activities within the community of Avalon and within the service area of the proposed facility. He was a member of the Knights of Columbus from 1956-1966. In the years 1965-1966, he was the Grand Knight of the Knights of Columbus. In 1965, he organized a farewell party for the pastor of his parish in Avalon. During the years 1981-1986, Mr. Ponce participated in six Avalon Rotary Club-sponsored 10K benefit runs. Between the years of 1981 and 1986, he participated in five sheriff department-sponsored benefit runs. He attended and supported the annual Avalon hospital benefit dances in each year between the years of 1975 and 1986. (ACB Ex. 5).

53. Mr. Ponce is presently employed by Avalon Municipal Hospital. He will resign from that position in order to assume the position of local sales manager at the proposed station if the construction permit is granted. Neither Avalon, Catalina Broadcasters nor any of its principals has any ownership interest or position in any medium of mass communications. (ACB Ex. 2).

Es Posible Minority Media Telecommunications, Inc.

54. Es Posible is a California corporation with 100.000 shares of common stock authorized and issued. (Es Posible Ex. 1). It was incorporated on March 26, 1986. (Island Ex. 14). Stock subscription agreements were issued on August 13, 1986. (Island Ex. 12, Tr. 1589). Rosemary Garcia holds 51.000 shares of Class A voting stock, representing all authorized and issued shares of that class. Ms. Garcia's equity interest in Es Posible stands at 51%. She is the sole voting shareholder. She has been the sole director of Es Posible. (Tr. 1497).

55. Mateo R. Camarillo holds 49,000 shares of Class B non-voting stock, representing all authorized and issued shares of that class. (Es Posible Ex. 1). Mr. Camarillo's equity interest stands at 49 percent. Mr. Camarillo holds no voting stock.

56. Ms. Garcia and Mr. Camarillo signed a contributor contract in which they each respectively agreed to pay 51% and 49% of Es Posible's expenses. (Island Ex. 15, Tr. 1439).

57. Neither Es Posible nor Rosemary Garcia has any interest in or connection with any medium of mass communications other than the present application for a construction permit for Avalon, California. (Es Posible Ex. 3).

58. Mateo R. Camarillo, a non-voting stockholder in Es Posible, holds 43 percent of the voting stock in Quetzal Bilingual Communications, Inc. which holds a construction permit for an AM broadcast facility licensed to San Diego, California (File No. BP-810710AE). Mr. Camarillo proposes half-time integration in the operation of that station.

59. Rosemary Garcia is the sole voting shareholder in Es Posible. (Es Posible Ex. 2). She intends to be General Manager of the station.

60. She will work full-time at the station in her position as General Manager, devoting a minimum of 40 hours per week to her position. (Es. Posible Ex. 2, Tr. 1578, 1595). As General Manager, she will set station policy, oversee the day-to-day operations of the station, maintain overall control of the hiring and firing of personnel, and be responsible for the implementation of the station's Equal Employment Opportunity Program. (Es Posible Ex. 2, Tr. 1596). The station manager and all department heads will report to her. (Es Posible Ex. 2, Tr. 1595).

61. Ms. Garcia first heard about the availability of the proposed station from Mr. Camarillo. (Tr. 1406). Mr. Camarillo and Ms. Garcia have been friends and business associates since 1975. (Tr. 1407). In mid-January 1986, Mr. Camarillo sought to interest Ms. Garcia in the Avalon application. (Tr. 1409, 1412). Ultimately, Ms. Garcia decided to proceed with the application on the basis that she would receive the controlling interest. (Tr. 1414, 1416). Mr. Camarillo had previously described the ownership structure of other applications that he had participated in. (Tr. 1415).

62. Mr. Camarillo suggested to Ms. Garcia the names of two attorneys, one of whom was Mr. Ernest Sanchez. (Tr. 1416, 1493). Ms. Garcia retained Mr. Sanchez as counsel to assist her in preparing the application. (Tr. 1417).

63. Mr. Sanchez' office hired Robert Purcell as the engineer. (Tr. 1417). Ms. Garcia filled out a questionnaire and discussed the programming and EEO portions of the application over the phone with Mr. Sanchez' office. (Tr. 1418). Mr. Sanchez' office mailed the completed application to Ms. Garcia who reviewed and signed it, and sent it back to counsel immediately. (Tr. 1422-23).

64. Ms. Garcia started drafting the Articles of Incorporation before she signed the application. (Tr. 1423). Mr. Sanchez assisted her in drafting the percentage of ownership clause. (Tr. 1423).

65. Ms. Garcia initially paid the expenses of Es Posible's application, sending Mr. Camarillo the bills for his share. (Tr. 1570). She opened a corporate account in October 1986. (Tr. 1571). Only Ms. Garcia is authorized to sign checks on behalf of Es Posible. (Tr. 1599). The checkbook and banking statements for Es Posible's corporate funds are kept at her house.

66. Ms. Garcia has lived in the service areas of the proposed station for over 37 years. (Es Posible Ex. 2). Ms. Garcia's current and previous residences are located within the predicted Grade B contour of Es Posible's proposed station. (Es Posible Ex. 2 at 2). She has reviewed Figure 3 in the engineering exhibit of Es Posible's amendment filed March 31, 1986, has found where her current and previous residences are located on the map, and has determined that all are located with the predicted Grade B of Es Posible's proposed station. She currently resides at 450 Fern Dell Place, Glendora, California. (Es Posible Ex. 2). She has lived at that address since 1974. She lived at 14973 East Temple in LaPuente, California from 1955 to 1974, at 3519 1/2 Montclair in Los Angeles, California from 1950 to 1955 and in an apartment on Indiana Street in East Lost Angeles from 1949 to 1950. Ms. Garcia is unable to recall the exact East Los Angeles address. All of East Los Angeles is located within the predicted Grade B contour of the proposed station. (Es Posible Ex. 2 at 2). If the application of Es Posible is granted, Ms. Garcia will purchase an additional residence in Avalon and live there much of the time. (Es Posible Ex. 2, Tr. 1432). At the hearing, Ms. Garcia explained that the phrase "much of the time" meant, that after the start-up phase of the station, she would live in Avalon 100% of the time and travel to Glendora once a month. (Tr. 1594). She has no plans to move back from Avalon at any point in the future. (Tr. 1579).

67. Ms. Garcia is an Hispanic female. (Es Posible Ex. 2 at 2).

68. Ms. Garcia has been active in a number of civic activities within the service area of the proposed station. She has been an active member in the Glendora Chapter of the League of Women Voters for eight years. (Es Posible Ex. 2 at 2). She has volunteered about two hours a month as the Vice-President of the School Board at St. Dorothy's School since 1984. (Es Posible Ex. 2 at 2, Tr. 1557). A member of St. Dorothy's Church in Glendora since 1974, Ms. Garcia has participated in fundraisings which included donating money to St. Dorothy's School. (Es Posible Ex. 2 at 2, Tr. 1557-58). A member of the St. Dorothy's Youth Ministry since 1986, Ms. Garcia arranges dances for teenagers. (Es Posible Ex. 2 at 2, Tr. 1558-59). She established and funded scholarships for needy students at St. Dorothy's School since 1986. (Es Posible Ex. 2 at 2). She is a contributing patron of the City of Glendora Community Bandshell. (Es Posible Ex. 2 at 2, Tr. 1559). Ms. Garcia is a founding member and organizer of the Association of Hispanic Owners and Operators of McDonalds in the Los Angeles Areas since 1976. (Es Posible Ex. 2 at 2, Tr. 1559-60). Her activities with the Owner and Operators group since the early 1980's include fundraisers such as the Navidad de Los Barrios, an annual project to provide Christmas gifts to poor families, and the creation of a childrens' park in a poor section of downtown Los Angeles. (Es Posible Ex. 2 at 2). Another one of the civic activities of the group was a Shoe Drive for Needy Children in Los Angeles in 1978. (Es Posible Ex. 2 at 2, Tr. 1560-61). In the Shoe Drive, Ms. Garcia did most of the work of a committee of four persons who bought and distributed 10,000 pairs of shoes for needy children over the course of a year. Her current activity in the Owner and Operators group is starting an internship program for Hispanic students. (Tr. 1560).

69. Ms. Garcia was also a founding member of a Ronald McDonald House in 1979 and the Ronald McDonald Campground in 1985. (Es Posible Ex. 2 at 2. Tr. 1561). She donated her personal money to the Ronald McDonald House. (Tr. 1562). Ms. Garcia was also a founding member of the Low Vision Center in Glendora in 1984. (Es Posible Ex. 2 at 2).

70. She has participated in the Echo Park Chamber of Commerce since 1977 and the Pacoima Chamber of Commerce since 1975. (Tr. 1563-64). Both are located within the service area. (Tr. 1563-64). She furnished uniforms for the Boys Club basketball and baseball teams as part of her activities in the Chamber of Commerce. (Tr. 1564). She also personally attended the Pacoima Chamber of Commerce meetings in 1975-76.

71. Ms. Garcia led student discussions on drug abuse, nutrition and other topics in Pacoima between 1975 and 1976. (Es Posible Ex. 2 at 3). She served as a PTA President in a LaPuenta elementary school for two years between 1960 and 1961. (Es Posible Ex. 2 at 3, Tr. 1400, Tr. 1566). She was a Brownie Leader and Cub Scout Den Mother in LaPuenta from the mid-1950's to early 1960's. (Es Posible Ex. 2 at 3, Tr. 1566). Ms. Garcia served in the Hacienda-LaPuenta Unified School District by participating on the Steering Committee from 1970 to 1971 and as Second Vice-President, Certified Employee Council between 1970 and 1972. (Es Posible Ex. 2 at 3, Tr. 1566). She was a member of St. Joseph's Church in LaPuenta from 1954 to 1974. (Es Posible Ex. 2 at 3. Tr. 1567).

72. Ms. Garcia holds a B.A. in Elementary Education from California State University at Los Angeles. (Es Posible Ex. 2 at 3). She currently is 50% owner of three corporations, Es Posible, Inc., Henrose, Inc. and Rosehen, Inc., and one proprietorship. All are McDonalds franchises. She also is an officer and director of the three corporations. She manages the financial affairs of these four family businesses and directs the investment of pension plan funds.

73. If the application of Es Posible is granted, Ms. Garcia will turn over her day-to-day responsibilities for the four businesses to others. (Es Posible Ex. 2 at 3, Tr. 1567, 1435). Ms. Garcia hired her daughter in June 1986 to assume most of her responsibilities and already has reduced the average number of hours that she devotes to her businesses from about 40 hours per week to under 25 hours. (Es Posible Ex. 2 at 3, Tr. 1434-36, Tr. 1567). Her daughter will eventually take over all of Ms. Garcia's current duties except check signing, pension fund management and other significant financial matters. (Es Posible Ex. 2 at 4, Tr. 1435). Those remaining responsibilities will be turned over to the co-owner of the businesses, her husband. (Es Posible Ex. 2 at 4, Tr. 1435). Ms. Garcia will retain her offices and board memberships. (Es Posible Ex. 2 at 4). Her time commitments to the existing businesses will be limited to participation on board meetings (held about every six months, all four board meetings at the same time) and to participation in major business decisions. She expects that these activities will require, on average, only a few hours per month. Ms. Garcia plans to work full-time at the station indefinitely. (Tr. 1579).

Christine E. Shaw

74. Christine E. Shaw is an individual applicant. In the event that her application is granted, Shaw proposes to serve at least 40 hours per week as General Manager of the proposed station. (Shaw Ex. 1). As General Manager, Shaw proposes to have overall responsibility for the operation of the station, including the hiring and firing of personnel and overseeing subordinate personnel in the discharge of their functions. She presently lives, and has for over 35 years lived, within the predicted Grade B contour of the proposed station, except for a period of about 12 months in 1978 and 1979, during which time she was living and working in Manila, the Philippines.

75. Shaw is a resident of Pasadena, California. She proposes to move from Pasadena to Avalon and to reside there permanently on a full-time basis in the event that her application is granted. Shaw is a Pacific Islander minority group member.

76. Shaw has been active in the following civic activities:

> 1) She has served as a sponsor of the De Mar Charity Horse Show, conducted by the American Saddle Breed Association of Southern California, in 1985 and 1986. The charity event raises funds for the Scripps Hospital charity.
>
> 2) She has served as a sponsor of the Cares Horse Show, conducted in Griffith Park, Los Angeles, California, in 1985 and 1986. The charity event raises funds for crippled children.
>
> 3) She has been a society member of the Los Angeles Symphony from 1981-1986.
>
> 4) In July 1980, she served as volunteer assistant director of the "Richard Pryor Telethon" for the Alicia Ann Rausche Burn Fund, a telethon which resulted in the raising of funds to help burn victims. As such, she assisted in the directing of the telethon for one day in January 1980.

77. Since 1983, Shaw has served as director of "The Doctor Is In", a religious program aired on various stations around the United States and distributed by The University Network by satellite. She has performed duties on a full-time basis (greater than 40 hours per week) for Delores Press, Inc., the company which distributes the program.

78. In the event that her application is granted, Shaw proposes to hold no other part-time or full-time employment or consulting functions, "except for possibly pursuing interior decorating to the extent that it does not interfere with her position at the station."

79. Shaw has no ownership in any medium of mass communications.

Air Hazard Issue

80. Submitted as an attachment to Shaw's Proposed Findings is what appears to be a "Determination of No Hazard to Air Navigation" concerning Shaw's proposed site, issued by the Federal Aviation Administration on April 7, 1988. Although Shaw promised in her Proposed Findings to file a Petition to Reopen the Record so that the FAA determination could be accepted, Shaw has never made such a filing.

Financial Qualifications / Certification Issues

81. A financial qualifications issue and a financial certification issue were added against Christine E. Shaw. In response to those issues, Shaw offered Exhibit 3, a three-page statement accompanied by four attachments. Attachments 1, 2 and 3 consist of a letter, dated September 22, 1987, from Michael Parker, President of Partel, Inc., addressed to Shaw, and seven pages purporting to be an "analysis of the cost to develop, construct and operate [her] proposed television station on Channel 54, Avalon . . . ." Attachment 4 is a "proposal" dated July 10, 1987, addressed to Shaw and signed by K. Weyna, President, Wilshire Stamp Company, Inc., a "personal friend" of Shaw's (Tr. 3192), purporting to show the value of Shaw's stamp and coin collections and the amount that could be raised by the sale of those collections. None of this documentation was available to Shaw at the time she filed her application on February 10, 1986, and certified that she was financially qualified to construct the proposed station and operate it for 90 days without revenue (Tr. 3021-22, 3030, 3122, 3130, 3294-97).

82. Shaw's Affidavit (Exhibit 3) states that the estimated cost of construction and operation of the proposed station would be $919,783.10 and that she would be able to yield $930,000 from the liquidation of her stamp and coin collections to meet those expenses. During the course of her testimony at hearing, Shaw stated that the initial estimate given her by Partel, Inc. for the costs of construction and three months' operation was $750,000; Tr. 3264, but that subsequently that figure was reduced to $700,000. Shaw was unable to specify, however, at what point the reduction of $50,000 took place or what elements of her cost projections were adjusted to reflect that reduction.

83. Shaw also testified that her projected costs had been increased by the amount of $200,000 in light of her proposal to contribute that amount toward the purchase of new equipment for the Avalon Airport (Tr. 3023). Thus, but for the adjustment of her estimated costs by $50,000, her total projected costs would have been over $950,000, and her estimate of $930,000 in proceeds from the proposed sale of her stamps and coins would have left her with a shortfall of over $20,000. When asked on cross-examination if the $50,000 reduction in costs was made specifically for the purpose of correcting such a shortfall, Shaw was evasive (Tr. 3265-66). Moreover, the testimony of Michael Parker, Shaw's consultant, made clear that there is no record of the adjustments in question because his firm did not produce written documents showing the cost breakdown as changes were made, but merely entered the information into its computer and modified it over the course of time (Tr. 3300-02).

84. Shaw stated in her Affidavit that she "calculated the total costs of preparation and filing" of her application and for three months' operation. Shaw Ex. 3, p. 1. On cross-examination, however, Shaw could not explain what calculations she made or that she, in fact, made any calculations on her own (*see e.g.*, Tr. 3129).

85. Shaw also stated that prior to filing her application, she

> . . . retained Partel, Inc., a communications consulting firm, to aid me in preparing my application. The Partel staff assisted me in analyzing my personal financial situation, appraising my assets and verifying the state of my liabilities.

Shaw Ex. 3, p. 2. At her deposition taken January 15, 1987, however, Shaw testified that Mr. Parker and/or Partel, Inc., took no part in assisting her in preparing her application (Tr. 3223). She testified at the hearing that her deposition testimony was true (Tr. 3224). When faced with the inconsistency between her Affidavit, quoted *supra*, and her deposition testimony, Shaw conceded at the hearing that she concealed her retention of Partel, Inc. as a consultant because she "thought that would mess [her] up for the application . . . ." (Tr. 3227).

86. Exhibit 3, to which Shaw attested on January 5, 1988 as being true, reads as follows:

> "The attached contract [Attachment 4 to Exhibit 3] between the Wilshire Stamp Company, and me for the sale of my stamp and coin collections is a true and complete copy of the Agreement."

Yet, on December 31, 1987, five days before Shaw swore to the accuracy of Exhibit 3, she and Wilshire Stamp Company entered into an "amendment" to their earlier agreement (Tr. 3190). The amendment is not mentioned in Shaw Exhibit 3, but was received into evidence as the Presiding Judge's Exhibit 2 (Tr. 3196). Nevertheless, prior to December 31, 1987, the earlier agreement between Shaw and Wilshire Stamp Company had not been modified (Tr. 3190). Pursuant to the terms of that agreement (Shaw Exhibit 3, Attachment 4), Wilshire Stamp Company agreed to take possession of the stamps and coins in question, on "consignment" and agreed to "guarantee" $700,000 in proceeds for the stamps, and to advance $350,000 to Shaw based on a specific schedule commencing 30 days after Shaw's acceptance of the agreement. Exhibit 3, Attachment 4, p. 3. Shaw accepted the agreement on September 27, 1987. Consequently, pursuant to the schedule set forth in the Wilshire Stamp Company proposal, the following amounts were to have been paid to Shaw on the dates indicated:

Amount	Date
100,000	10/17/87
50,000	11/27/87
50,000	12/27/87
50,000	01/27/88
50,000	02/27/88
50,000	03/27/88

According to Shaw's testimony at the hearing, none of those payments was made to her by Wilshire Stamp Company prior to the date of her testimony on January 6, 1988.[1] (Tr. 3192, 3297-98).

87. At no time did Shaw take steps to satisfy herself that Wilshire Stamp Company would be in a position to meet its "guarantee" that it would provide at least $700,000 in connection with the sale of her stamps (Tr. 3151). Nor did Michael Parker, Shaw's consultant, verify Wilshire Stamp Company's ability to deliver on its "guarantee." Instead, Parker relied solely on conversations with Mr. Weyna of Wilshire Stamp Company, Shaw's accountant, Mr. Crane, and Shaw's attorney, Mr. Masry, for verification of the appraisal of Shaw's stamp and coin collections (Tr. 3396). Moreover, Parker did not examine any written confirmation of Wilshire Stamp Company's appraisal until July 1987 when the written proposal was made to Shaw (Tr. 3386).

88. Michael Parker's testimony (Tr. 3293-96) reveals that he (or his staff at Partel, Inc.) communicated with Shaw either by telephone or in person but that he never presented her, prior to the filing of her application, with written documentation showing a breakdown of the proposed costs of prosecuting her application and constructing the station. He merely gave her a figure ($750,000) which ostensibly represented the total costs of construction and three months' operation without revenue. In addition, Parker told Shaw that his analysis of her financial status led him to conclude that she was financially qualified under FCC policy and could certify to that effect in her application (Tr. 3297).

89. Parker's affidavit (Shaw Ex. 4) states that in making that determination,

> Partel, Inc., also assisted Ms. Shaw in the preparation of her personal financial statement prior to the filing of her application. In so doing, the staff acquired from Ms. Shaw a list of those assets she is willing to commit to this venture, evaluated the liquidity of those assets, and concluded that Ms. Shaw's financial liquid assets greatly exceed the cost estimates made by Partel.

On cross-examination, however, Parker conceded that he/Partel did not prepare a "personal financial statement" *per se*, for Shaw, but merely met with Shaw and took notes as she verbally listed the assets on which she hoped to rely in certifying to her financial ability to construct the proposed station (Tr. 3361-66). The "financial statement" which resulted from those discussions was never formalized and was returned to Shaw, according to Parker (Tr. 3364-65). Moreover, the listing did not include any liabilities except Shaw's debt to American Express based on purchases made on her credit card (Tr. 3362). Shaw represented to Parker that she did not have any other liabilities. She reiterated her contention that she had no liabilities during her own cross-examination (Tr. 3030-38).

90. Later, Shaw testified that she is a 10% owner of a ranch in Bradbury, California, but denied that she had any liabilities in connection with the property (Tr. 3165-67). Subsequently, Catalina 54 Exhibit 10 was identified and received into evidence, showing that Shaw and Dr. Gene Scott, Inc. are trustors on an "All-Inclusive Purchase Money Deed of Trust" dated February 13, 1986, which indicates a lien on the Bradbury property in the amount of $1,895,000 (Tr. 3168-73). Shaw testified that she believed she only had a 10% interest in the property and was not aware that she would be liable for payment of the trust deed amount (Tr. 3169).

91. Shaw never produced a personal balance sheet in this proceeding (Tr. 3033). Moreover, when asked if she had a "listing of personal assets and liabilities" prior to filing her application, Shaw testified that she did not (Tr. 3234).

Golden Shores Broadcasting, Inc.

92. Golden Shores is a Delaware corporation (Golden Shores Ex. 1). Faye Hauser is the President and a director of Golden Shores. She owns 100% of the applicant's

voting stock. Lee D. Andrews owns 100% of Golden Shores' non-voting stock. He was the Secretary/Treasurer and a director of the corporation until October 9, 1986. Golden Shores does not seek integration credit (Golden Shores Ex. 3).

93. Neither Golden Shores nor Faye Hauser have any interest in any other medium of mass communication.

Catalina Broadcasters

94. Patrick D. Sisneros is an individual applicant doing business as Catalina Broadcasters. (Catalina Broadcasters Ex. 1). He first learned of the availability of the Channel 54 allocation from his friend, Riley Jackson, on or about January 1, 1986. (Tr. 1664, 1673, 1666). A meeting was held between Mr. Jackson and Mr. Sisneros in mid-January 1986. (Tr. 1669). An oral agreement was reached whereby it was planned that Mr. Jackson and Mr. Sisneros would go forward in an application for the Channel 54 allocation as partners -- Mr. Sisneros would be the general partner, and Mr. Jackson would be the limited partner. (Tr. 1671-72). As the general partner, Mr. Sisneros would be the operator of the station. (Tr. 1673). Although Mr. Jackson suggested and retained the engineer that was ultimately utilized by Mr. Sisneros (Tr. 1665), recommended legal counsel (Tr. 1674), and assisted in helping Mr. Sisneros plan various facets of his application (Tr. 1675, 1688, 1691), along with others (Tr. 1675, 1688, 1691, 1697, 1707), it was determined, prior to the "B" cut-off date in this proceeding, that Mr. Jackson would not become a part of the application. That decision was made due to the fact that Mr. Jackson owned another broadcast station located in San Bernardino County, California (Tr. 1665) and his participation could result in diversification or overlap problems. (Tr. 1708). Mr. Jackson was repaid the1,200 he had advanced to the engineers (Tr. 1670, 1695, 1706).

95. If Catalina Broadcasters' application is granted, Mr. Sisneros will be employed at the station full-time as General Manager. Mr. Sisneros began living in Sunset Beach, California, in September 1979. (Sisneros Ex. 1; Tr. 1684). He intends to remain in Sunset Beach if his application is granted, but will stay in Avalon during the week in order to effectuate his integration commitment. (Tr. 1684).

96. As the General Manager, Mr. Sisneros will oversee the construction and operation of the station and will have ultimate responsibility for all decisions affecting the day-to-day and long-range operations of the station. He will hire department heads and oversee the hiring of other key station personnel. The programming, administrative, promotional, and sales components of the station's operations will be under his supervision. He will be responsible for the administration of the station's Equal Employment Opportunity program. Mr. Sisneros will effectuate his integration proposal by terminating his current employment activities. (Tr. 1703). His law partners are aware that he has pending an applicant for Channel 54. (Tr. 1703-04).

97. Mr. Sisneros is an Hispanic male. (Catalina Broadcasters Ex. 1; Tr. 1680-81). His residence is located in Sunset Beach, California, within Catalina Broadcasters' proposed city grade contour. (Catalina Broadcasters Ex. 1; Avalon Catalina Broadcasters Ex. 1). He has resided at his current address since 1979. In addition, he has lived at various addresses within the proposed city grade or service area contour of Catalina Broadcasters' station since 1950.

98. Mr. Sisneros served on the Board of Directors of Our Lady of Corvallis High School beginning in 1980 through approximately 1984, and served as president for approximately one year. (Catalina Broadcasters Ex. 1). The Board of Directors generally met once per month. The school was located in Studio City, California.

99. Mr. Sisneros has been a member of the Burbank Chamber of Commerce from 1983 through the present. He regularly attends the Chamber's meetings (generally once per month), participates in surveys, and has assisted in the Chamber's lobbying efforts.

100. Mr. Sisneros has no interest in any medium of mass communications. (Catalina Broadcasters Ex. 1).

Island Broadcasting Limited Partnership

101. Island Broadcasting is a California limited partnership. (Island Ex. 1A). The general partners of Island are Dr. Julio Brito, Ms. Carol Robinson and Ms. Rosemary Fincher; each owns 32.66% of the limited partnership. The limited partners are Mr. Richard E. Eby and Mr. William T. Bailey; each owns one percent of the limited partnership.

102. When the application for Channel 54 was filed on February 10, 1986, Island was a corporation and the original stockholders were Ms. Fincher, Ms. Robinson, and Dr. Brito. (Tr. 1778). Ms. Fincher was Secretary-Treasurer, Ms. Robinson was Vice-President, and Dr. Brito was President. (Tr. 1779). The corporation was formed in June 1985 at the initiation of Dr. Brito. (Tr. 1779). In March 1986, the corporation was withdrawn and the limited partnership substituted as the applicant. (Island Ex. 1). The change in the applicant's structure occurred when Mr. William T. Bailey and Mr. Richard E. Eby were brought in as investors. (Tr. 1783-84). Mr. Eby is an acquaintance of Ms. Robinson and she suggested that he become a limited partner in Island (Tr. 1881). Mr. Bailey is an acquaintance of Dr. Brito, who proposed that Mr. Bailey become a limited partner in Island (Tr. 1981).

103. Ms. Fincher intends to work full-time at the proposed station as the station's General Manager (Island Ex. 2). In this capacity, she will be responsible for overall operation of the station and all department heads will report directly to her. She will also be one of three members of the Program Committee and in that capacity will have a one-third vote on programming matters.

104. Dr. Brito proposes to work at the proposed station full-time as Director of Broadcast Operations. In this capacity, Dr. Brito will coordinate the operation of the station from engineering through programming. (Island Ex. 3). Dr. Brito will report to the General Manager, and will have a one-third vote in programming decisions made by the Programming Committee. (Island Ex. 3).

105. Ms. Robinson will function as Director of Programming and Public Affairs, centering her efforts on program development, program acquisitions, public ascertainment of community needs and all public affairs announcements and programs. (Island Ex. 4). She plans to work full-time at the proposed station. She will report to the General Manager, and will have a one-third vote on the Program Committee.

106. Ms. Fincher is an Hispanic female. (Island Ex. 2; Island Ex. 3). She plans to move to Avalon. Ms. Fincher currently resides in Westwood, within the Grade B contour. She testified that in February 1987, she moved to Westwood from Ontario. (Tr. 1799). Her previous address

in Ontario, which more precisely was in the City of Etiwanda, lay outside the Grade B contour of the station. (Avalon Catalina Broadcasters Ex. 1). Prior to her 19 months residence in Etiwanda, Ms. Fincher lived within the service area for 27 years.

107. For about six years, Ms. Fincher taught modeling to the under-privileged and juvenile delinquents. (Island Ex. 2). At her modeling school, Ms. Fincher offered scholarships to delinquent girls. In 1986-87, Ms. Fincher was the Chair of the Nominating and Publicity Committee of the West Valley Council of the League of United Latin American Citizens. She did publicity work for the Ontario Chamber of Commerce from 1984 - 1986. She was a founding member, and does publicity and fundraising for the Inland Empire Make A Wish, a nonprofit foundation for terminally ill children since 1984. She also does publicity and fundraising for the Business & Redevelopment Association of the Inland Empire. Ms. Fincher received a Bachelor's degree in Communications in 1983. Prior to activation of Island's station, Ms. Fincher will move to Avalon. (Island Ex. 2).

108. Ms. Fincher is currently the station manager for KSCI-TV, San Bernardino, California and has held this position since January 15, 1987. She served as director of marketing from April 1984 to December 1986, of KIHS-TV, Channel 46, Ontario, California. She was an assistant director of creative services and public service announcement coordinator, from December 1982 to April 1984 at KDOC-TV, Channel 56, Anaheim, California. She was an on-air announcer, producer/host and administrative assistant at KLON FM 88 Radio, from June 1980 to January 1981; and a news writer from January 1980 to June 1980 at KEZY in Anaheim, California.

109. Dr. Brito is an Hispanic male. Dr. Brito moved to California from Puerto Rico 3-1/2 years ago. (Island Ex. 3). He first lived within West Los Angeles, within the service contour, for a year and then moved to his current residence in Upland. (Island Ex. 3; Tr. 1987). The Upland residence is not within the Grade B contour of the station. (Avalon Catalina Broadcasters Ex. 1). Prior to activation of Channel 54 at Avalon, Dr. Brito will establish residence in Avalon. (Island Ex. 3; Tr. 2015).

110. Dr. Brito is presently employed as the Director of Engineering and Operations for KIHS, Channel 46, at Ontario, California and has held this position since 1983. He has also been a consulting engineer from 1982 to 1983 at station WLUZ-TV Puerto Rico; director of engineering/manager of the production facilities, at WAPA(TV) from 1962 to 1982; and chief engineer at station WOLE-TV, Aguadilla, Puerto Rico, from 1959 to 1962. (Island Ex. 3).

111. Dr. Brito, on a volunteer basis in 1984, assisted the City of Ontario, California, in developing its television/video system. Also in 1985, he assisted the Riverside College in solving production problems. Dr. Brito has been a member of LULAC (The League of United Latin American Citizens), West Valley of San Bernardino County, Council No. 2877, since December 1986. He has been a member of the Nominating Committee and currently is a participant of the Publicity Committee.

112. Ms. Robinson is a black female. (Island Ex. 4). Ms. Robinson has lived in Ontario for the last 2-1/2 years within the Grade B contour. (Tr. 1955). Prior to that, she resided in La Crescenta, California (approximately one year), Van Nuys, California (approximately two years), Granada Hills, California (approximately three years), and Pacoima, California (approximately three years). All the foregoing communities, except Ontario, are within the primary contour of the proposed station. Prior to activation of Channel 54 at Avalon, Ms. Robinson will establish residence in Avalon.

113. Ms. Robinson has been employed with station KHSC, Channel 46 since 1986 as the Director of Programming and Public Affairs. She has also been Program Manager at station KIHS from 1984 to 1986; Manager of Broadcasting (1982-1984), Manager of Broadcast Operations (1981-1982), Coordinator of Broadcast Operations (1980-1981), Traffic Supervisor (1979-1980), and Traffic Assistant (1979-1980), at KCET, Channel 28; a Writer's Assistant at Nichol, Ross & West Co. (1979); a Traffic Specialist at KCET Channel 28 (1975-1976); and a Local Desk Operations Coordinator at station KHJ (1974-1975). (Island Ex. 4).

114. Carol Robinson serves on the Advisory Board for Chaffey College Telecommunications Department in Alta Loma, California. (Island Ex. 4). She is a volunteer coordinator for Aztlan Community Services. Currently, she is organizing "Block Parenting" groups for elementary schools in Ontario, California.

115. None of the principals of Island Broadcasting have any attributable interest in any medium of mass communications.

Avalon Broadcasting, A California Limited Partnership

116. Avalon Broadcasting is a California limited partnership. Its general partner is Elena Josefe, Inc. (EJI), a California corporation wholly owned by Elena Josefe. It has 44 limited partners in two classes, capital contributing and services contributing. (Avalon Broadcasting Ex. 1).

117. Telarc, Inc. (Telarc), a broadcast marketing firm, instigated the Avalon Broadcasting application. (Tr. 2087-88, 2094). Telarc's services for the Avalon application included locating the persons to act as general partners, selling limited partnership shares, assisting in obtaining financing, providing marketing and support data, assisting with partnership documents and helping to file the application. (Tr. 2087-88, 2094, 2096-97, 2104, 2112.

118. Thomas Van Wagoner is Telarc's president and a stockholder; John Hobgood is a director and a stockholder and was involved in Telarc research; and Christina Van Wagoner, Thomas Van Wagoner's daughter, is a stockholder, a director and, until December 1986, was vice president of operations. (ACB Ex. 20, pp. 15-16; Tr. 2093-94, 2282). Clark Woodard, Christina Van Wagoner's husband, was Telarc's sales manager. (Tr. 2146). Thomas Van Wagoner's son, Stephen Van Wagoner, until late 1986, was the sole shareholder and president of Newport FM Engineering, Inc. (Newport), an engineering firm which worked with Telarc on the Avalon application. (Tr. 2094-96, 2113).

119. Ms. Josefe was first approached about the Avalon station by Dale Cox, a customer of the shop at which she works, in September 1985. (Tr. 2323). Cox was working with Telarc to recruit a general partner for an application to be filed for the Avalon station. (Tr. 2455, 2532-33). Cox and Cox's attorney, Joseph Kennedy -- who also had incorporated Telarc -- then referred Josefe to Thomas Van Wagoner. (Tr. 2094, 2109-10, 2336).

120. In mid-October 1985 Josefe met with Cox, Thomas Van Wagoner, Christina Van Wagoner, Stephen Van Wagoner and David Knudson, a Newport engineer, at her home. (Tr. 2110, 2121, 2336). Although Avalon Broadcasting was not yet a limited partnership, it was a group intending to form such a partnership in order to file an application. By the time of the meeting with Josefe, Thomas Van Wagoner already had selected a name for the group -- Avalon Broadcasting -- and was seeking investors. (Tr. 2122, 2124-25, 2598). Also, certain partnership documents already had been drafted, including a private placement memorandum, a partnership agreement, and a subscription agreement noting Telarc and Avalon Broadcasting as the parties which would accept partnership subscriptions. (ACB Ex. 15; Tr. 2136, 2224). Thomas Van Wagoner already had set up an escrow account for the limited partnership shares with Burrows Escrow, a company which he had used for several years in his real estate dealings. (Tr. 2125-26, 2129, 2221-22, 2284).

121. Ms. Josefe was given the partnership documents to review, including the private placement memorandum which had been drafted by Mr. Kennedy. (Tr. 2116-18). That memorandum, dated October 15, 1985, listed Telarc, Newport, Cox, Kennedy and Michael Tipton as proposed service contribution limited partners. (Tr. 2117-20, 2582.

122. A "Proposed Limited Partnership Application Summary," dated October 15, 1985, which summarized the placement memorandum, also was provided to Josefe before she entered the partnership. The summary described Telarc's plan to form a limited partnership to apply for the Avalon station, stating that the unnamed general partner would have a 15% equity and the limited partners 85%, and that, as limited partners, Telarc and Newport would each receive equity of 14.5%, Cox 5% and Michael Tipton 1.5%.

123. Sometime after the mid-October meeting, Josefe told Thomas Van Wagoner that she would become Avalon Broadcasting's general partner if her attorney, Michael White, approved all of the documents. Thomas Van Wagoner, Josefe and White had a meeting. (Tr. 2111-12, 2124). Then, on November 20, 1985, White sent to Van Wagoner a "letter of intent" stating that Josefe agreed to form a corporation to be the general partner of the applicant, subject to approval of the limited partnership agreement and the memorandum of private placement which Telarc's attorneys were preparing. It further stated that the attorneys' fees incurred by Josefe in forming a corporation and negotiating the partnership would be reimbursed to her but it did not identify from whom that reimbursement would come. (ACB Ex. 11).

124. The November 20 letter further states that Telarc and Newport would indemnify Josefe from "any losses that may be incurred in connection with the partnership." (ACB Ex. 11; Tr. 2207). Josefe had insisted on that condition if she were to become a general partner. (Tr. 2211). The letter also notes that Kennedy would prepare legal documents, Newport would do the engineering, Telarc the marketing and financial consultation, and Burrow Escrow would be the escrow agent pursuant to preliminary escrow instructions Telarc had provided. (ACB Ex. 11; Tr. 2212). Thomas and Stephen Van Wagoner and Josefe signed the letter agreement. (*Id.*; Tr. 2207, 2260-61).

125. Mr. Van Wagoner began introducing Josefe to potential investors, showing each potential investor the October 15 placement memorandum. (Tr. 2115-17). Also, the subscription agreement identifying Telarc as a party which could accept subscriptions was also shown to investors through at least February 1986. (Tr. 2234-37). Van Wagoner continued to seek investors for Avalon Broadcasting through August or September 1986. (Tr. 2238).

126. EJI's Articles of Incorporation were filed with the State of California in November 1985. (Tr. 2363). Although a "Waiver and Notice and Consent to Meeting" and "Certification of Adoption of Bylaws" were signed by Josefe with a date of February 19, 1986, Josefe testified that those documents were not actually signed until December 1986. (Tr. 2365-67). The corporation's bylaws and minutes of its first meeting also were not signed by Josefe until December 1986. (Tr. 2365-66). Finally, an agreement to purchase 100 shares in EJI, and a check to purchase those shares were both executed in December 1986. (ACB Ex. 19; Tr. 2365, 2369-72, 2576). Stock in EJI was not issued to Josefe until February 20, 1987. (Tr. 2363-69, 2575-76).

127. From the time she agreed to become involved with Avalon Broadcasting, Josefe had an oral agreement that Telarc, Newport, Cox and Kennedy would receive services limited partnership interests in return for their respective services (Tr. 2448, 2522-28) and until early 1987, she understood each of them had the right to those interests. (Tr. 2448, 2458-59, 2522-25). Conversely, she understood that Telarc, Newport and Kennedy each believed they had a right to that equity. (Tr. 2113-14, 2522-25).

128. Thomas Van Wagoner recommended to Josefe that Avalon Broadcasting use Newport as its engineering firm, and Newport was hired as such. He also referred Kennedy to Josefe "as the attorney who would do the partnership documentation," including the private placement memorandum, the partnership agreement and other work for the partnership. (Tr. 2123. Kennedy did serve as the partnership's counsel until December 1986. (Tr. 2324). Thomas Van Wagoner also referred Josefe to communications attorney F. Joseph Brinig, who served as counsel to other applicants with whom Telarc was involved. (Tr. 2151-52). Brinig represented Avalon Broadcasting for several months, including filing the application. (Tr. 2152, 222, 2431-32). Josefe never spoke to Brinig before the application was filed but Thomas Van Wagoner had contacted Brinig to secure his services. (Tr. 2431).

129. Josefe did not draft the Avalon Broadcasting application; it came to her already completed. (Tr. 2340-41). Josefe did not know who prepared the EEO program in the application (Tr. 2351), but Telarc shareholder Hobgood "may have" assisted her with that section (Tr. 2155). Josefe also did not know who had prepared the program service statement in the application, although she had talked to Stephen Van Wagoner, Thomas Van Wagoner and Mr. Hobgood about it. (Tr. 2350-51. At deposition Josefe testified that, to the best of her knowledge, Stephen Van Wagoner had prepared the first three pages of the legal qualifications section of the application, but at hearing she said she did not know who had prepared the first page of the section and that Michael White had supplied information for the second page. (Tr. 2338-42).

130. Since Telarc was responsible for obtaining a financial commitment for the partnership with respect to the financial certification, Josefe simply asked Thomas Van Wagoner about the steps he had taken and whether financing was secured. (Tr. 2347-48, 2621-22). Bank financial commitment letters obtained by Thomas Van

Wagoner were sent to her at some point but the only contact she had with the banks was to call to acknowledge receipt of the letters. (Tr. 2588-90).

131. Avalon Broadcasting's transmitter site was obtained by Stephen and Thomas Van Wagoner and Kennedy. (Tr. 2351-52). Thomas Van Wagoner called the site owner's attorney, Mary Schreiber, twice in December 1985, regarding the site and a copy of Schreiber's letter to Josefe concerning the site was sent to Van Wagoner. (Tr. 2213-15). In fact, the site certification in Avalon Broadcasting's application was signed by Stephen Van Wagoner.. (Tr. 2352-53). Stephen Van Wagoner later provided Josefe with information regarding a studio site, at a meeting June 1986. (Tr. 2457).

132. Ms. Josefe did not prepare a budget or a business plan for the application. (Tr. 2352-53, 2591). Thomas Van Wagoner and Mr. Hobgood prepared and furnished to her the budget estimates and someone from Telarc discussed it with her. (Tr. 2357-58, 2591). Josefe noted that although the budget indicates operation of the station would be from 6:00 a.m to 1:00 a.m., she never intended such hours of operation. (Tr. 2357). At deposition she testified she had first seen the budget in March 1986. (Tr. 2353).

133. Avalon Broadcasting's application was filed February 10, 1986. In that application it represented itself as a limited partnership in which EJI was the general partner holding 10% ownership in the partnership. (ACB Ex. 20, pp. 5-6). Josefe testified that at the time of the filing she had 10% ownership and was "holding" 90% for sale. (Tr. 2345-46).

134. A Certificate and Agreement of Limited Partnership, dated January 30, 1986 (hereinafter "January 30 Agreement"), was drafted by Kennedy. (ACB Ex. 9; Tr. 2137, 2325, 2509). The January 30 Agreement provided that EJI and the "original limited partnership" agreed to form a limited partnership, that EJI was required to pay $100 and services as the general partner and that the capital contributing limited partners were to pay a $5,000 fee for each limited partnership unit, which equaled 2% of the equity. (ACB Ex. 9, p. 1; Tr. 2570). Additionally, the limited partners were subject to a mandatory assessment of additional funds by the general partner, for up to 50% of each limited partner's original investment. (ACB Ex. 9, pp. 1-2). The January 30 Agreement provided that the allocation of profits and losses would be 10% to the general partner and 90% to the limited partners, but stated that start-up financing could dilute the equity percentage of all partners. *Id.* Under the January 30 Agreement, the general partner could be removed by a "vote of two-thirds in interest of the Limited Partners." *Id.*

135. The January 30 Agreement was not signed by Josefe until March 28, 1986. (ACB Ex. 9; Tr. 2325; 2434-35, 2509). No one else signed the January 30 Agreement until well after March 31, 1986.

136. Also, the earlier private placement memorandum dated on January 30, 1986, still describing Telarc as the applicant's marketing firm and listing Telarc, Newport, Cox, Tipton and Kennedy as limited partners. (Tr. 2133-34).

137. On March 17, 1986 Josefe executed a certificate of limited partnership which was to be filed with the State of California. (ACB Ex. 21). The certificate required the name of the partnership, its general partners and the term of the partnership. Josefe completed those items and executed the certificate even though she and her attorney knew she had not yet signed a partnership agreement and that the document setting up a limited partnership was only "in the process." (Tr. 2511-13). The certificate was filed with the state on April 10, 1986. (ACB Ex. 21).

138. At the end of May 1986, Avalon Broadcasting retained Benjamin Perez as its counsel. Josefe decided to hire Perez after discussions with Thomas Van Wagoner at a meeting where Cox was present. Thomas Van Wagoner had suggested Perez. (Tr. 2442-43, 2597).

139. An "Amended and Restated Certificate and Agreement" (hereinafter "June 16 Agreement") was drafted and dated June 16, 1986. (ACB Ex. 10). It was sent to Josefe from Kennedy. (Tr. 2440). A primary difference between the June 16 Agreement and the January 30 Agreement is that the later agreement states that the general partner has a 20% equity interest, rather than a 10% interest. (ACB Ex. 10; Tr. 2441). The June 16 Agreement identified Dale Cox as the "Original Limited Partner." Like the January 30 Agreement, it states that the manner of offering, terms and conditions for subscriptions and admission of limited partners will be as provided in the offering memorandum. While the January 30 Agreement states that start up financing could dilute the equity percentage of all partners, the June 16 memo states such financing could dilute equity percentage of all limited partners. The January 30 Agreement provision that, in the event of a buy-out settlement, the limited partners would receive their return of capital contribution first, was deleted in the June 16 Agreement. The June 16 Agreement provides that limited partners shall contribute capital "and services" to the partnership, while the January 30 Agreement does not refer to services. However, the June 16 Agreement states that the limited partners shall not have material involvement in the management or operation of media-related activities of the partnership, that it is intended that any services rendered by them shall not be media-related and that no services of any kind will be rendered by the limited partners after program tests begin. The prohibitions are not included in the January 30 Agreement.

140. Under both agreements, the partnership indemnifies the general partner and its agents, employees, officers and directors from all claims, damages and liability incurred by an act performed in connection with partnership business except for fraud, bad faith, or gross negligence. The June 16 Agreement like the January 30 Agreement, provides for removal of the general partner by a two-thirds vote in interest of the limited partners, with no limitation on the basis for removal.

141. Between May 30 and June 16, 1986 the placement memorandum also was amended and restated. That memorandum still referred to Telarc, Newport, Cox, Tipton and Kennedy as limited partners. (Tr. 2456, 2488-92). The memorandum was given to prospective limited partners by Josefe and by Telarc sales people, including Thomas Van Wagoner, Mr. Hobgood and Clark Woodard. (Tr. 2489-90).

142. In the middle of 1986 Thomas and Stephen Van Wagoner learned that Josefe did not want to give Newport an equity interest in the applicant. (Tr. 2114-15). Also, during the summer of 1986 Josefe asked Thomas Van Wagoner to redistribute Telarc's interest to increase her equity and to reduce Telarc's to 4.5%. (Tr. 2251). Josefe knew that the greater equity EJI has, the better the application would appear and believes Van Wagoner told her the transfer would make her a stronger applicant. (Tr. 2401-02). Van Wagoner agreed that Telarc would "give

everything back" except 4.5%. (Tr. 2252-53). Josefe testified that Telarc and Newport each executed a document providing that "5% of their equity" was going to the general partner during the first part of June 1986 (Tr. 2396-97, 2400-01). She later testified that the increase in her equity is memorialized in the June 16 Agreement. (Tr. 2600-01; ACB Ex. 20, pp. 24-25, 32). Josefe paid nothing for the interests given her by Telarc and Newport. (Tr. 2254).

143. In answers to a request for admissions filed with the Commission in July 8, 1986 and sworn by Josefe, Avalon Broadcasting represented that both Newport and Telarc had ownership interests in Avalon Broadcasting as "insulated limited partners." (ACB Ex. 20, pp. 11, 15-16). On August 5, 1986 Avalon Broadcasting filed an amendment reporting that Newport's "equity ownership" had been "decreased to zero" and that the ownership interest of EJI had been changed from 10% to 20%. In Avalon Broadcasting's integration statement filed that same day, Telarc was described as a "limited partner."

144. At Josefe's request, Telarc arranged to give away or sell the rest of its interest in the application a short time later. (Tr. 2244-45, 2266). Part of Telarc's interest was given to Clark Woodard and part to Mr. Tipton. (ACB Ex. 23; Tr. 2245-46). Telarc also sold some of its service equity to three people for $2,500 each, a total of $7,500. (Tr. 2574-75). Documents assigning Newport and Telarc equity interests to others were drafted by Kennedy and were signed by Stephen and Thomas Van Wagoner on September 2, 1986 and by Josefe on September 4, 1986. (ACB Exs. 17, 18, 23; Tr. 2147, 2262, 2268). In an amendment filed September 23, 1986 Avalon Broadcasting reported that the "equity ownership" of Telarc was to be decreased to zero within the next few days.

145. On October 10, 1986, Avalon Broadcasting filed a supplement and erratum to an opposition to petition to enlarge stating that as of September 6, 1986 Telarc "has less than 5% equity interest" in the partnership and that Josefe had four times as much equity as Telarc. (ACB Ex. 20, pp. 57-58). Then, in a "Supplement to Amendment" filed October 28, 1986, and verified by Josefe, it was reported that the "equity ownership" of Telarc had been decreased to zero and that Telarc had released its equity on September 2, 1986. *Id.*, pp. 62-63. In answers to interrogatories filed October 29, 1986, it was represented that Josefe was a 20% general partner as of June 16, 1986, that she originally had 10%, and that Newport and Telarc each had a 12.5% limited partnership interest which was reduced to zero on September 4, 1986. (ACB Ex. 20.

146. Avalon Broadcasting's procedure for signing on limited partners was to have each limited partner execute a separate partnership agreement, which would then be co-signed by the general partner. (Tr. 2263). Thomas Van Wagoner testified that at the time the application was filed and the partnership formed Telarc was a limited partner with about 12% equity. (Tr. 2140, 2252). Also, at the time of the transfers of Telarc's interest, Thomas Van Wagoner believed Telarc had a written partnership contract with EJI and had a right to the equity. However, he also testified that in the Spring of 1986 he had realized that he did not have a signed agreement from Josefe, but believed he was to become a limited partner under his verbal agreement with her. (Tr. 2140, 2266). He said although he did not recall signing the January 30 Agreement, he believed he had signed the June 16 Agreement. (Tr. 2138-39). Josefe testified that, in fact, Telarc had sent her an executed limited partnership agreement to sign in approximately mid-July 1986. (Tr. 2392-93). She never received a signed agreement from Newport. (Tr. 2502). Josefe did not sign the Telarc agreement because she did not want to "formalize their entry" into Avalon Broadcasting. (Tr. 2392-93). Thus, she said, Telarc was "in" but it was not "formally signed in" since there was no document evidencing its ownership. (Tr. 2393). Josefe testified that Telarc had the right to receive equity but she was still "negotiating" with Telarc. She also testified she believed in August 1986 that Telarc and Newport had a right to equity and that they were each a limited partner. (Tr. 2395-96). Josefe said she was uncertain in the late Summer of 1986 whether she was going to "sign in" Telarc and Newport. (Tr. 2503-04).

147. Thomas Van Wagoner testified he was surprised to learn from Josefe, before the January 1987 depositions, that Josefe had never signed a partnership agreement with Telarc. (Tr. 2264, 2270). Josefe also claimed that she believed Telarc had a right to equity in the partnership until two days before her deposition when she was told by Perez that he had found no documents making Telarc a limited partner. (Tr. 2389-90).

148. On February 4, 1987, Avalon Broadcasting filed an amendment reporting that the interests of "former limited partners" Joseph Kennedy, Clark Woodard and Dale Cox had been transferred to other parties.

149. Josefe testified that Kennedy never signed a partnership agreement. (Tr. 2459). However, she testified that he transferred his "interest" to another party as a gift. (Tr. 2561-62). Josefe said Cox signed the June 16 Agreement. (Tr. 2452-55). Cox received his service equity interest in return for finding Josefe, under a 1985 letter agreement with Telarc. He transferred his service equity interests to his sons. (Tr. 2531-35, 2557, 2561). In her written testimony Josefe testified that Cox had reassigned his equity to "new unrelated parties." (Avalon Broadcasting Ex. 1; Tr. 2537).

150. Clark Woodard, who sold Avalon Broadcasting limited partnership shares for Telarc, also owned a 1.2% equity interest in the form of service equity. He transferred that service equity interest to his parents in late 1986. (Tr. 2490, 2566-70). He transferred the interest because of the prohibition on service-limited partners "doing absolutely anything." (Tr. 2573). Perez advised it was desirable to have those parties which had provided service to dispose of their interests.

151. Josefe has received a $5,000 "management" fee from the partnership. (Tr. 2399-2400). She testified on cross-examination on March 11, 1987 that she has been reimbursed for all money put into the application except for the $100 she had paid for stock in EJI, the $100 from her personal bank account which she had paid for her partnership interest, and her time spent on the project. (Tr. 2399-2400, 2580). She paid nothing for the additional 10% equity she had received from Telarc and Newport. (Tr. 2581). However, on March 12, 1987, Josefe testified that she had incurred some expenses for which she had not received reimbursement, including the expenses of "independent research" by talking to friends while taking them "out to eat." She testified that she had spent at least $300 for which she would not seek reimbursement on that "research." (Tr. 2602). She also testified that she had to cash in her IRA to pay Avalon Broadcasting bills -- for which she was subsequently reimbursed -- but did not claim reimbursement for the substantial interest and tax

penalties resulting from that action. (Tr. 2601, 2619-20). Josefe also testified that she had traveled from Avalon, where she owns a home, to Los Angeles, where she also owns a home, in conjunction with Avalon Broadcasting business and that she had not sought reimbursement for those expenses. (Tr. 2601). Josefe also claimed to have had other "miscellaneous" expenses. (Tr. 2602).

152. Josefe was unsure of the general partner's responsibility for Avalon Broadcasting's debts. She first testified that she believed that EJI was responsible for 100% of the debts but then said she understood it was responsible for 20%. She finally concluded that she was "confused." (Tr. 2577-78).

153. Josefe proposes to work 40 hours per week as General Manager of the station. (Avalon Broadcasting Ex. 3). She also plans to hire a station manager. (Tr. 2552, 2559). Josefe currently works as manager of Carlotta's Mexican Shop in Avalon, a business owned entirely by her mother. (Avalon Broadcasting Ex. 3; Tr. 2507). She testified that she plans to curtail her activities in the shop to no more than five hours per week. However, she does not plan to close the shop if Avalon Broadcasting is the successful applicant and she is not yet "sure" who would take over her duties when she leaves since it is "extremely difficult" to obtain employees. (Tr. 2551-52). Josefe noted that her sister could help with the shop in 1987 but not necessarily after that time. Her mother has a full-time job and will not work at the shop. (Tr. 2552).

154. Josefe resides in Avalon part of the year. The rest of the year she resides at 4859 Seldner Street, Los Angeles, within the service area, with her mother. (Avalon Broadcasting Ex. 3; Tr. 2318). She and her mother have co-owned their Los Angeles home since 1967. (Tr. 2318). Josefe spent approximately 75% of her time in Avalon in 1986, with that amount of time depending on the weather and whether her mother's shop was open. (Tr. 2313-15). In 1985 she spent approximately seven months in Avalon (Tr. 2316-17). Josefe noted that since Carlotta's Mexican Shop is open only on weekends during the winter months of January, February and March, up until Holy Week, she goes to Avalon on the weekends during that time. (Avalon Broadcasting Ex. 3; Tr. 2313). Josefe's driver's license, charge card statements and personal checks all list her Los Angeles address. (Tr. 2318-19). EJI corporate documents, including a January 1987 filing, and a February 1986 domestic stock statement, also list her Los Angeles address. (ACB Ex. 22; Tr. 2319). The bank accounts for EJI and Avalon Broadcasting are with a bank with no office in Avalon, although there is a bank only about a block from Carlotta's Mexican Shop. (Tr. 2485-87).

155. Avalon Broadcasting's integration statement does not state whether Josefe would reside in Avalon or Los Angeles while integrated at the Avalon station. Nor did Avalon Broadcasting's direct case exhibits make any such statement. During redirect examination at hearing, Josefe testified she would not commute from Los Angeles to Avalon because it was too long and expensive. (Tr. 2608-09).

156. Josefe has participated in some civic activities in Avalon and in the service area. (Avalon Broadcasting Ex. 3).

157. Josefe is an Hispanic female. (Avalon Broadcasting Ex. 3, p. 1).

158. Neither Avalon Broadcasting, EJI nor Josefe has any interest in any media of mass communications. Josefe testified in her written direct case exhibits that none of Avalon Broadcasting's current limited partners nor "limited partners that formally held interests" have had any ownership interest in mass media. (Avalon Broadcasting Ex. 2).

David H. Wagner d/b/a DHW Communications

159. David H. Wagner is an individual applicant. (DHW Ex. 1). Wagner proposes to work at the proposed station full-time (a minimum of 40 hours per week) on a daily basis as its General Manager. As such, he will supervise all aspects of station operations, including the hiring and firing of employees. He will supervise the managers of sales, programming, traffic and other departments. He will terminate his current employment in business activities and move to Avalon, California in order to fulfill his proposal. Mr. Wagner is a black male.

160. Mr. Wagner owns 40% of the non-voting common stock, constituting a 24% equity interest, of Metro-Crescent Communications, Inc., the permittee of a new UHF television broadcast station at Belmont, North Carolina. He also owns approximately 22.2% of the Class B, non-voting common stock, constituting a 20% equity interest, of Caro Corp, the permittee of a new UHF television station in Charleston, South Carolina. In addition, Mr. Wagner holds a limited partnership interest in an application for a television station in Arlington, Texas, and is an individual applicant for a new television at Denver, Colorado. He has no other interest in or connection with any other media of mass communications.

III. CONCLUSIONS OF LAW

Coastal Broadcasting Partners

161. Mr. Lee and BEI were the initial parties to the Coastal Limited Partnership Agreement. That Agreement was executed on December 4, 1985. On or about January 28, 1986, Mr. Johnson joined the limited partnership as a general partner by amendment of the originally executed Agreement. The Certificate of Limited Partnership for the partnership was filed with the State of California on May 27, 1986. The "B" cut-off date was March 31, 1986. The California Revised Limited Partnership Act requires the filing of a Certificate of Limited Partnership, and provides that the partnership is formed at the time the Certificate is filed in the office of the Secretary of State.

162. Relying on *Pacific Television, Limited*, 2 FCC Rec. 1101 (Rev. Bd. 1987), several of the opposing applicants argued that Coastal is entitled to no integration credit at all because the State of California did not recognize Coastal as a validly formed entity until it filed its Certificate of Limited Partnership on May 27, 1986, well after the "B" cut-off date of March 31, 1986.

163. *Pacific Television, supra*, was a case in which integration credit was denied because the applicant had proceeded past the "B" cut-off date relying on "informal or oral ownership arrangements", and not because of some failure to file papers with state authorities by that time. Rather than compliance with technical requirements of state law, the Commission seeks assurance that the organizational form selected by an applicant will in fact function as proposed. *Signal Ministries, Inc.*, 60 RR 2d

1700 (Rev. Bd. 1986). In the usual case, that assurance is derived from a written agreement between or among the individuals forming the applicant entity. Here, the Agreement governing Coastal's structure had been formally executed by all of its participants and was in full force and effect as of March 31, 1986. Coastal's ownership structure was fixed prior to the "B" cut-off date; its failure to have complied fully with state filing requirements by that time is not material in this case.

164. Mr. Lee and Mr. Johnson together hold only ten percent of the equity in Coastal. In *Independent Masters, Limited*, 60 RR 2d 835 (Rev. Bd. 1986), the Review Board expressed serious reservations about "whether a 'general' partner holding a mere ten percent equity interest in an entity can then extrapolate that fractional equity interest into an *effective* 100% comparative 'integration' credit (along with the concomitant weight of any enhancing merit for such as minority ownership, etc.)." The proposal was nevertheless fully credited. Since that time, the Commission, in *Victory Media, Inc.* (FCC 88-134, released April 12, 1988), granted 100% integration credit to a corporate applicant whose sole integrated principal owned less than 20% of the total equity. In the circumstances, it is concluded that the distribution of equity in Coastal does not require that its integration proposal be discredited.

165. Coastal is entitled to 100% quantitative integration credit. That integration credit is substantially enhanced by the minority status of both of its general partners. The integration credit is also enhanced by Mr. Johnson's long-term residence within the proposed service area and by his involvement in civic activities there. Minor enhancement is also awarded for Mr. Johnson's 20 years of experience in the broadcast field. Coastal's proposal is also enhanced slightly by Mr. Lee's past residence in the service area.

Catalina 54 Broadcasting, Ltd.

166. An applicant is entitled to the percentage of quantitative integration credit that accurately reflects the extent of legal authority and voting power the integrated owners possess to implement station policies and decisions. *High Sierra Broadcasting Inc.*, 99 FCC 2d 423; *Northland Communications*, 100 FCC 2d 914; *Reginald A. Fessenden Educational Fund, Inc.*, 59 RR 2d 1255.

167. Gordon Peppars, President of CCC, owns 100% of the voting stock of the corporation, while the remaining five principals own 20% each of the corporation's non-voting stock. However, four of the non-voting shareholders are directors of CCC and all five of those individuals hold elective offices. Because the Board of Directors holds the power to "[manage] the business and affairs of the Corporation . . . ", the non-voting status of the four additional directors is irrelevant in determining the degree of integration which can be awarded for Mr. Peppars' participation.

168. Not only are the non-voting shareholders obligated as corporate directors to manage the corporate business, but Mr. Peppars also testified that he intends to seek the advice of the other officers and directors of CCC with respect to the operation of the proposed station. The probability of such a process is strengthened by his longstanding acquaintance with those individuals and the participation of some of those individuals in the applicant's affairs to date.

169. For example, Duane Johnson is authorized and required to sign checks on behalf of both CCC and Catalina 54. In addition, Mr. Johnson and Reynaud Moore participated in developing Catalina 54's business plan, Mr. Moore was involved in formulating its programming proposal, and Carl Poston participated in the formulation of the limited partnership agreement. To the degree that these purported "non-voting" shareholders have taken a role in CCC's (and therefore Catalina 54's) business up to this time and will take an active role upon Mr. Peppars' request, such involvement reduces the exclusive authority to manage the proposed station ostensibly held by the sole "voting" shareholder, Mr. Peppars. *See Gerald Broadcasting Co., Inc.*, 61 RR 2d 389 (Rev. Bd. 1986).

170. The active managerial role of CCC's non-voting stockholders is further indicated by the fact that a five member Board was chosen for CCC to avoid a voting deadlock. By consciously avoiding the possibility of a voting deadlock among the members of its Board, CCC demonstrates an intention to be bound by the decision of a majority of its directors, even in the case of Peppars' dissent. Peppars' testimony that he will remove the Board and dismiss the non-voting shareholders from office if a policy disagreement arises is inconsistent with that objectively derived intention.

171. The integration credit claimed by Catalina 54 must be diminished to the degree that Peppars' exclusive authority to manage and control the applicant, and operate the proposed station, is reduced by the involvement of CCC's ostensibly non-voting stockholders. CCC's non-voting principals have been involved in the affairs of the applicant. They sit on CCC's Board of Directors and act as officers of the corporation. Each will be involved in the future affairs of this station. Catalina 54 is entitled to no more than 16.6% integration credit, which represents Peppars' 1/6 interest in the applicant.

172. Mr. Peppars integration proposal is enhanced by his former long-term residency in the service area of the proposed station, by his participation in civic activities there, and by his promise to move to Avalon, California, in the event of a grant to Catalina 54. The proposal is also enhanced by Mr. Peppars' broadcast experience, and by his status as a member of a racial minority.

Avalon, Catalina Broadcaster, Inc.

173. Avalon Catalina cannot receive integration credit for the proposed participation of Mr. Robert Ponce in station affairs. That is because his functions have not been shown to be managerial or policy-making in nature. He will be "responsible" for sales, but only for local Catalina Islands sales. His job will largely involve the selling of commercial time. He is not sure whether there will be anyone for him to supervise. There is simply no showing that Mr. Ponce's role will sufficiently involve station management and policy-making functions to warrant integration credit. *Apogee, Inc.*, 99 FCC 2d 979 (Rev. Bd. 1985; *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090 (Rev. Bd. 1982).

174. Avalon Catalina is entitled to 80% quantitative integration credit for the participation of Oscar Nunez and Catherine Ponce. That integration is enhanced by the minority status of those principals, the long-time, local residence of Catherine Ponce in Avalon, and the long-time residence of Mr. Nunez within the proposed station's service contour -- and his present local residence within the city grade contour of the station. In addition, the

integration proposal is enhanced by the local civic activities of the two integrated principals within the station's service area and, in the case of Catherine Ponce, within Avalon itself.

Es Posible Minority Media Telecommunications, Inc.

175. Es Posible is entitled to 100% full-time quantitative integration credit for the participation of Ms. Garcia. She is the sole voting shareholder and director, and will devote a minimum of 40 hours per week as the General Manager of the proposed station. As the General Manager, she will set station policy, oversee the daily operations of the station, including the hiring and firing of personnel and the equal employment opportunity program. The station manager and all of the department heads will report to her.

176. The quantitative integration credit is enhanced by Ms. Garcia's status as an Hispanic female. Enhancement credit is also warranted for Ms. Garcia's past and current residence in the service area for over 37 years, and her extensive civic involvement in the service area throughout that period. Finally, the integration credit is enhanced by Ms. Garcia's proposal to establish a residence in Avalon if Es Posible receives the construction permit.

Christine E. Shaw

Air Hazard Issue

177. Submitted as an attachment to Shaw's proposed findings is a "Determination of No Hazard to Air Navigation" concerning Shaw's proposed site, issued by the Federal Aviation Administration on April 7, 1988. The air hazard issue is resolved in Shaw's favor.

Financial Qualifications / Certification Issues

178. The Review Board has made it clear that

> The *sine qua non* for financial qualifications under prior case precedent and the new certification procedure is *written documentation*. Earlier versions of Section III of Form 301 required the submission of copies of all loan agreements with banks or individuals (setting forth loan amount, interest rate, terms of repayment, and security, if any) and the submission of balance sheets or financial statements for each person or entity except financial institutions that had agreed to furnish funds, showing all liabilities and containing current and liquid assets sufficient in amount to meet current liabilities and to satisfy the proposed broadcast commitments . . . . [The] present Form 301 continues to require written documentation to support 'reasonable assurance' of funds. The only change is that now the documentation need not be *submitted* in the application process unless requested by the Commission.

Las Americas Communications, Inc., 1 FCC Rcd. 786, 788, 61 RR 2d 1008, 1015-16 (Rev. Bd. 1986) [emphasis in original].

179. Shaw's financial showing in response to the issues added against her plainly fails to meet the standards enunciated by the Review Board. At the time she filed her application, Shaw had no documentation in her possession to provide reasonable assurance that the funds necessary to construct the proposed station would be available. Neither the cost analysis prepared for Shaw by Partel, Inc. nor the proposal submitted by Wilshire Stamp Company for the sale of her stamp and coin collections was available to Shaw, in writing, at the time she filed her application. Indeed, Shaw did not even have any written confirmation, by way of a budget or cost breakdown, as to what her expenses would actually be. She never obtained written confirmation that adequately supported and accurately reflected her purported original financial plan. Thus, Shaw did not have at the time of filing, and never had since that time, reasonable assurance that she was financially qualified.

180. Although she chose to rely on her personal assets as the source of funding her proposal, Shaw did not prepare a personal balance sheet or other financial statement prior to filing her application. Instead, she simply relied on the opinion of a consultant (Michael Parker of Partel, Inc.) who did no more than make a few notes based on conversations with Shaw about her assets and obtain an oral estimate of the value of those assets without any documentary support from a long-time acquaintance of Shaw's. The validity of the information provided to Parker by Shaw, moreover, is called into question by the fact that she advised Parker that she did not have any liabilities. As the record shows, Shaw in fact is the signatory to a $1.9 million deed of trust on property in which she owns a 10% interest. Without knowledge of such liability, Parker's "analysis" of Shaw's personal financial situation is meaningless.

181. A more fundamental flaw in Shaw's financial showing demonstrates the inadequacy of her purported ability to meet proposed expenses. Without explanation as to what item in her financial proposal had changed, Shaw testified that Partel's estimate of her costs for construction was somehow reduced from $750,000, the original figure, to $700,000. Having arrived at a total figure of $930,000 for expected proceeds from the sale of her stamp and coin collections, Shaw's reduction in the anticipated costs by $50,000 conveniently left her with a cost estimate of $919,783.10, sufficiently less than $930,000 to "prove" her financial capability. Shaw's evasiveness in the face of this unexplained cost reduction forces the conclusion that the adjustment was made in order to accommodate the additional expense of $200,000 for the new airport landing equipment to which she committed herself, and that she does not, in fact, have sufficient funds to meet expenses --even if her proposal to rely on personal assets is taken at face value.

182. Turning to those assets, the "proposal" made by Wilshire Stamp Company (WSC) does not stand up under close scrutiny. The basic flaw, of course, is that WSC did not provide any written support for its proposal until July 10, 1987. Even assuming *arguendo* that the documentation was available to Shaw when she filed her application, the substance of WSC's proposal is itself unreliable. Although couched in terms of an appraisal of Shaw's assets, WSC's "proposal" purports to "guarantee" a payment to Shaw in the amount of $700,000 from the sale of her stamps. Yet Shaw never ascertained WSC's ability to meet such a commitment, nor did Partel make any such attempt when it relied on WSC's oral commitment and on that basis advised Shaw that she was financially qualified under current FCC policy. Neither Shaw nor Partel ever exam-

ined WSC's financial statements to determine its ability to meet its guarantee to Shaw to deliver $700,000 for the sale of the stamps.

183. There is ample evidence in the record, in any event, to question independently WSC's ability -- or its inclination -- to meet its guarantee. Pursuant to the original "proposal," WSC was obligated to make periodic payments on a $350,000 advance to Shaw, pursuant to a specific schedule. Those payments, however, were never made. The proposal itself was amended, moreover, five days prior to Shaw's verification that her Affidavit and its Attachments, were true, yet no mention of the Amendment was made in her Affidavit. It was only on cross-examination that Shaw conceded that WSC did not make the payments to her, and explained that she asked WSC not to do so on advice from her tax advisor (Tr. 3192).

184. In sum, at the time her application was filed, Shaw not only did not have any documentation in her possession regarding the specific costs of constructing the proposed station, but she did not even have a personal financial statement, in writing, showing net current assets to meet the projected costs. Rather, she relied entirely on vague estimates provided to her orally and made virtually no attempt to verify their accuracy. She repeatedly testified that she hired other people to handle the details and demonstrated little or no first-hand knowledge of the information she purportedly relied upon in formulating a financial proposal.

185. Having concluded that Shaw did not have the necessary documentation to be considered qualified either at the time she filed or at the "B" cut-off, her certification of financial capability must be viewed as false. Shaw's dissembling testimony makes clear that she has continuously misrepresented the circumstances surrounding her financial certification.

186. The most glaring example of Shaw's attempt to cover up her total lack of support for her certification is her direct testimony. Shaw states that she made calculations concerning the costs of construction, she estimated the value of her assets, and she concluded that she could meet her expenses by liquidating her stamp and coin collections. The record shows, however, that she made no calculations but rather abdicated that responsibility to Partel, Inc.; that she did no first-hand appraisal of her assets but simply relied upon oral advice obtained from a personal friend as to the value of those assets; and that she made the certification based on advice obtained from Partel, Inc.

187. In addition, Shaw deliberately and falsely stated in her deposition that she had no outside help in preparing a financial plan and certifying her financial qualifications. It was only when an issue was raised as to her qualifications that she admitted retaining Partel, Inc.

188. Shaw's evasiveness with respect to the reduction in her cost estimates from $750,000 to $700,000, allegedly prior to the addition of the $200,000 for airport equipment, gives further credence to the conclusion that she has misrepresented her financial situation in this proceeding.

189. Finally, Shaw's description in her Affidavit of the services she received from Partel, Inc. are entirely misleading in the face of the record evidence that no "personal financial statement" was ever prepared, and whatever analysis was done by Partel was not reduced to writing until several months after the application was filed and the "B" cut-off date passed.

190. In sum, Shaw's disregard for the financial standards imposed by the Commission on applicants for new facilities and her total abdication of responsibility for determining her ability to certify her financial qualifications require a finding that she is financially unqualified and that her certification was false at the time she filed her application. Shaw's direct case testimony and her evasiveness on cross-examination reveal a distinct lack of candor with respect to the basis for her financial certification and therefore require her disqualification under the certification issue as well.

191. If Shaw had been found to be basically qualified, she would be credited with 100% quantitative integration, enhanced by her past residence in the service area, and her promise future residence in Avalon. That proposal would have been further enhanced by Shaw's past participation in local civic activities, her broadcast experience, and her minority and female status.

Golden Shores Broadcasting, Inc.

192. Golden Shores seeks no integration credit, and is entitled to none.

Catalina Broadcasters

193. Mr. Patrick Sisneros will be integrated into the day-to-day operation of the proposed station as its General Manager. He will work full-time in that position. Therefore, Catalina Broadcasters is entitled to 100% quantitative integration credit.

194. The proposal is qualitatively enhanced by Mr. Sisneros' minority status, his residency within the station's city grade contour, his plan to reside in Avalon itself during the work week, and by his participation in civic activities within the service area.

Island Broadcasting

195. Rosemary Fincher is currently the station manager at station KSCI-TV, Channel 18, in San Bernardino, California. Dr. Julio Brito is the director of engineering and operations for station KIHS, Channel 46, Ontario, California. Carol A. Robinson is the director of programming and public affairs for Channel 46. Neither of these three general partners made a commitment in their direct case to terminate their current employment. However, Ms. Fincher testified at hearing that she would no longer continue working for KSCI-TV if Island is awarded the construction permit. (Tr. 1868). Furthermore, the record supports the inference that Dr. Brito and Ms. Robinson will likewise terminate their current employment. Their employer, KIHS (now KHSC), Channel 46, Ontario, California would hardly tolerate the continued employment of two owners of a competing station in the same market. *Rahu Broadcasting, Inc.*, 56 RR 2d 285 (Rev. Bd. 1984), where media divestiture was inferred from the fact that the principal in question was an employee of a competing radio station licensed to the same community. Island's integration proposal will be credited; it is awarded 100% full-time quantitative integration credit.

196. Island's integration credit is enhanced by 100% minority ownership and 66.66% female ownership. The proposal is also enhanced by the local residence of each of its principals in the service area, and by the involve-

ment of the principals in civic activities, their past broadcast experience, and their commitment to move to Avalon.

Avalon Broadcasting

197. Avalon Broadcasting's limited partnership agreement fails to properly insulate the limited partners. In *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981), the Commission held that the interests of limited partners are not relevant to the integration analysis if the general partners are properly insulated from any possibility of control or influence by the limited partners. The Commission has now made applicable to the comparative integration analysis the criteria it set forth in *Ownership Attribution*, 1 FCC Rcd. 802 (1985). This means that for a broadcast equity interest to be passive and non-cognizable, a limited partner must not be involved "in any material aspect" in the management or operation of the broadcasting entity. To assure absolute passivity, the written limited partnership agreement itself must contain provisions prohibiting the limited partners from: a) acting as an employee, independent contractor, or agent of the partnership in the media activities of the company; b) communicating with the general partner on a day-to-day basis; c) removing a general partner other than for cause; d) performing any service, other than lending money to the limited partnership, which materially relate to its media activities; and e) becoming, in any manner, actively involved with the management or operation of the business. The Commission also specifically stated that providing legal services is included in the prohibition against performing services and noted that "[a] partner whose contribution to the partnership is in the form of personal services and expertise rather than in the form of a financial investment is the antithesis of a passive investor." 1 FCC Rcd. at 804.

198. The January 30 agreement in effect as of the "B" cut-off date (and even the later June 16 agreement) provides for removal of the general partner without limitation to removal "for cause." Such a provision has been held fatal to an integration proposal. In *Payne Communications, Inc.*, 61 RR 2d 1323, the Review Board disallowed any integration credit because the limited partners had the right to remove a general partner other than for cause. The Board noted that a general partner is likely to follow the advice of a limited partner if he knows that such limited partner possesses the power of removal and that such a power would provide the limited partner with the ability to control or at least materially influence partnership affairs.

199. The Avalon Broadcasting partnership agreement in effect on the "B" cut-off date is fatally lacking in another respect -- it did not restrict the limited partners from acting as employees, independent contractors, or agents of the partnership in its media activities, or from communicating with the general partner on a day-to-day basis, from performing any media related services for the partnership or from being actively involved in partnership business. Thus, it lacked the insulating provisions required in *Ownership Attribution*, *supra*.

200. The evidence regarding whether Telarc, Newport, and Kennedy ever acquired a binding ownership interest in Avalon Broadcasting is not clear. However, each of the three was allowed to give away its interest to others and Telarc actually sold some of its interest. Such actions indicate an ownership interest of some sought -- presumably, one owns that which he transfers. Josefe's testimony on the ownership question is confusing. She testified that she believed Telarc and Newport had a right to limited partnership equity under an oral agreement, yet she also testified that they were, in fact, limited partners. The final determination of the *bona fide* of an applicant's ownership structure is predicated on a "totality" of record evidence. *Payne Communications*, *supra*, 61 RR 2d at 1337; and *Susan S. Mulkey*, FCC 87 R-72 (Rev. Bd., Released February 9, 1988).

201. In *Magdalene Gunden Partnership*, 87 R-70, (Rev. Bd., Released February 1, 1988), the Review Board considered the legitimacy of a limited partnership. Finding that the limited partner there had sought out the frequency, had been active in locating the transmitter site, had retained attorneys and the engineers, had furnished most of the funds, and had sought, through it's attorneys, to form an association with someone to prosecute the application, it determined that the limited partner was "unarguably the engine and rudder" of the applicant vessel.

202. The activities of Avalon Broadcasting's limited partners, especially Telarc, also reveal a sham set-up. Telarc a) initiated the organization of the applicant, even selecting its name; b) brought together the partnership with the goal of recruiting a local minority general partner; c) arranged for the applicant's transmitter site; d) contacted Mr. Brinig as the applicant's communications counsel; e) obtained financing for the proposed station; f) set up the partnership's escrow account; g) located investors and sold limited partnership interest; h) assisted in the EEO section of the application; i) discussed with EJI the program service statement in the application; and j) prepared the applicant's budget. Telarc also recommended the engineering firm, Newport; the partnership attorney, Mr. Kenney; both communications attorneys, Mr. Brinig and Mr. Perez; and the escrow agent, Burrows. All of these parties work with or for Telarc, and Josefe "agreed" to all of them.

203. In contrast, Josefe's involvement in the application has been minimal. The application came to her completed by counsel and she did not know who had drafted it. Josefe did not even know who: a) prepared the EEO section, although a Telarc shareholder may have assisted her; b) prepared certain pages of the legal qualifications section, although Stephen Van Wagoner may have prepared some; and c) prepared the program service statement, although she talked with Telarc and Newport principals about it. Additionally Josefe relied upon Telarc's assurances of financing in certifying to the applicant's financial qualifications, and she had nothing to do with obtaining the transmitter site, even letting Stephen Van Wagoner sign the site certification.

204. Josefe's lack of involvement is coupled with the fact that she has entered into a virtually risk free venture. She formed a corporation to be the general partner and conditioned her involvement upon Telarc and Newport indemnifying both the corporation and her individually for any losses incurred with respect to the partnership. Josefe even required that the cost of incorporating and "negotiating" the partnership be reimbursed to her, and the January 30 and June 16 agreements indemnify the general partner and its officer and directors against all claims, damages and cost resulting from partnership activities in the absence of fraud or gross negligence.

205. Josefe's financial stake in the application has been *de minimis*. She paid only a nominal amount -- $100 -- for EJI's ten percent general partnership interest and obtained the other ten percent from Telarc and Newport for free. She paid $100 for her stock in EJI. She claims she spent time "managing" the partnership, but she was paid a $5,000 management fee to do so. After first acknowledging that she put no other unreimbursed monies into the application, she later claimed that she did have other expenses, including independent "research" in the form of dinner meetings with friends; money spent commuting from one city of residence to another; and "penalties" from cashing an IRA to pay bills for which she was reimbursed. Considered as a whole, it appears that Josefe's financial stake in this application has been almost nonexistent -- a few hundred dollars -- and she has no obligation to provide more money to the applicant. In contrast, the investment of the limited partners is substantial -- $5,000 for a two percent equity interest. This means that while Josefe paid $200 for her 20% equity interest, a limited partner would have to pay $50,000 for the same equity percentage. Also, limited partners are subject to a substantial continuing financial obligation. In conclusion, it appears the Elena Josefe is merely a figurehead in the Avalon Broadcasting Partnership. Telarc would guide this applicant. Its organizational structure is a sham, and no integration credit will be awarded for the proposed participation in station management of Ms. Elena Josefe.

206. If Ms. Josefe's integration proposal could be credited, Avalon Broadcasting would receive integration enhancement for Ms. Josefe's service area residency, civic participation, and enhancement due to her status as a female and a member of a racial minority.

David H. Wagner d/b/a DHW Communications

207. David H. Wagner, Jr. has proposed to be the full-time General Manager of his proposed station. Therefore, this applicant is entitled to 100% quantitative integration credit.

208. Mr. Wagner is a black male. The quantitative integration credit is enhanced on this account. Additionally, Mr. Wagner has stated his intention to move to Avalon in the event DHW's application is granted. Further enhancements of DHW's integration credit is awarded as a result.

ULTIMATE CONCLUSIONS

209. Christine E. Shaw is not qualified to receive a grant. No applicant receives a diversification demerit. The applicants receiving *less than* 100% quantitative integration credit are: 1) Catalina 54; 2) Avalon, Catalina; 3) Golden Shores; and 4) Avalon Broadcasting. The applicants receiving 100% quantitative full-time integration credit are: 1) Coastal; 2) Es Posible; 3) Catalina Broadcasters; 4) Island Broadcasting; and 5) DHW. The qualitative attributes of the latter category of applicants are set out as follows.

Coastal

210. Coastal's 100% quantitative integration credit is substantially enhanced by virtue of the fact that its two integrated general partners are members of racial minority groups. Mr. Johnson's service area residency, and his participation in some civic activities within the service area, enhance the proposal to a slight-to-moderate degree. His broadcast experience enhances the integration proposal to a slight degree, and Mr. Lee's former service area residency enhances the proposal only very slightly.

Es Posible

211. Es Posible's 100% quantitative integration credit is substantially enhanced by its integrated shareholder's racial minority status. The proposal is moderately enhanced by the integrated shareholder's status as a female, and moderately enhanced by her long-term service area residency and extensive participation in civic activities there. Finally, the integration proposal is slightly enhanced by the promise of future local residency.

Catalina Broadcasters

212. Catalina Broadcasters' 100% quantitative integration credit is substantially enhanced by the racial minority status of its sole proprietor. The proposal is moderately enhanced by Mr. Sisneros' long-term service area residency and scant participation in civic activities there. Sisneros' promise of future local residence garners the applicant a slight qualitative enhancement.

Island Broadcasting

213. Island's 100% quantitative integration credit is substantially enhanced by the racial minority status of its three general partners. Two of the three general partners are female, resulting in the award of slight-to-moderate enhancement credit. Two of the three general partners have service area residency, but only one of them (Ms. Fincher) shows some slight participation in service area civic activities. This results in slight-to-moderate enhancement. The integration proposal is slightly enhanced by the promises of the three general partners to establish residence in Avalon in the event of a grant.

DHW Communications

214. DHW's 100% quantitative integration credit is substantially enhanced by its sole proprietor's racial minority status. The proposal is further enhanced qualitatively, to a slight degree, by his proposal to move to Avalon in the event of a grant.

215. Apart from the 100% enhancement for racial minority status (to which each of these five applicants lays rightful claim), the qualitative integration enhancements awarded are as follows:

Coastal: slight-to-moderate, for service area residence and participation in civic activities; *slight*, for broadcast experience, and *very slight* for past service area residency.

Es *Posible: Moderate*, for female status; *moderate*, for service area residence and participation in civic activities; *slight*, for the promise of future local residency.

Catalina Broadcasters: moderate, for service area residency and civic participation, and *slight*, for the promise future local residency.

Island Broadcasting: slight-to-moderate, for female status; *slight-to-moderate*, for service area residency and civic participation; and *slight*, for promises of future local residence.

DHW Communications: slight, for the promise of future local residency.

216. With its two moderate enhancements and one slight enhancement, Es Posible is the preferred applicant herein. Island follows, with its two slight-to-moderate enhancements, and one slight enhancement. Catalina Broadcasters follows, with one moderate and one slight enhancement. Coastal, with its one slight-to-moderate, one slight, and one very slight enhancements, follows, and DHW, with a single slight enhancement, finishes last in this ranking.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion, the application of Es Posible Minority Media Telecommunications, Inc., IS GRANTED and the applications of Coastal Broadcasting Partners, Catalina 54 Broadcasting, Ltd., Avalon, Catalina Broadcasters, Inc., Christine E. Shaw, Golden Shores Broadcasting Inc., Catalina Broadcasters, Island Broadcasting Limited Partnership, Avalon Broadcasting, and DHW Communications, ARE DENIED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTES

[1] Payments were made to Shaw on January 1, 1988, pursuant to the "amended" proposal. Tr. 3187.

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-434

In the Matter of

Amendment of Section 73.202(b),	RM-6021
Table of Allotments,	RM-6191
FM Broadcast Stations.	RM-6192
(Scranton and Surfside Beach, South Carolina)	

MEMORANDUM OPINION AND ORDER

Adopted: February 3, 1989; Released: March 15, 1989

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for reconsideration filed by Jones, Eastern of the Grand Strand, Inc. ("Jones" or "petitioner") of the *Report and Order*, 3 FCC Rcd 2798 (1988), which denied its request to substitute Channel 276C2 for Channel 276A at Surfside Beach, South Carolina, and modify its license for Station WYAK-FM to specify the higher powered channel. Instead, the Commission granted the competing requests of Scranton Communications and Broadcasting of Scranton to allot Channel 275A to Scranton, South Carolina, as the community's first local FM service. Scranton Communications (SC) filed an opposition to the petition for reconsideration to which Jones responded.

2. In the *Report and Order*, the Commission rejected Jones' argument that Scranton is a "quiet village" and thus not eligible for a Section 307(b) preference over Surfside Beach. Jones does not seek reconsideration of that portion of the *Report and Order*. However, it states that, based upon newly discovered information, it is possible for Scranton to receive a first local service while also allowing Station WYAK-FM to upgrade on Channel 276C2. Specifically, it requests the allotment of Channel 286A to Scranton by substituting Channel 300A for unused but applied for Channel 286A at Johnsonville, South Carolina.[1] That change would allow the upgrade of Jones' Station WYAK-FM from Channel 276A to Channel 276C2. Jones contends that its reconsideration request must be granted pursuant to Section 1.106(c)(2) of the Commission's Rules, which states that petitions for reconsideration which rely on facts not previously presented to the Commission may be granted if the Commission determines that consideration of the facts relied on is required in the public interest. It argues that the public interest benefit is met because the new proposal will allow grant of both a first local service at Scranton as well as an upgraded service at Surfside Beach at Station WYAK-FM's present transmitter site. It recognizes that SC had proposed in the rule making that both interests could be satisfied if Station WYAK-FM were modified to operate on Channel 300C2 but notes that an upgrade of Station WYAK-FM on Channel 300C2 would have required the station to relocate its transmitter. However, it contends that new construction along the coastal wetlands will be avoided if it can upgrade its facilities at its existing location.

3. SC argues that the petition for reconsideration is nothing more than an untimely filed counterproposal to the allotment of Channel 275A at Scranton, noting that Section 1.420 of the Commission's Rules limits the filing of counterproposals to those submitted in initial comments. It further submits that petitioner's request contravenes Section 1.429 of the Rules which states that petitions for reconsideration which rely on facts not previously presented to the Commission will be granted only if the facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them or the facts relied on were unknown to the petitioner until after his last opportunity to present them and he could not, through the exercise of ordinary diligence, have timely learned of the facts in question. SC contends that petitioner had an opportunity in reply comments to set forth the new allotment scheme detailed in its petition for reconsideration but failed to either set forth the new proposal or to respond to that portion of the Scranton counterproposal which proposed the modification of petitioner's license to specify Channel 300C2 in lieu of Channel 276A. SC also argues that grant of the petition for reconsideration would disrupt the Commission's application processing procedures and be prejudicial to those parties who have already taken steps looking toward the filing of a construction permit application for Channel 275A at Scranton. Finally, SC states that petitioner should be required to adhere to the Commission's rules and thus seek the channel changes in a separate petition for rule making and not by way of a petition for reconsideration.

4. Jones argues that SC's objections, which it characterizes as "entirely procedural," are misplaced. It states that there is no authority for the proposition that requests for reconsideration of rule making decisions which rely on new facts are in actuality comments and therefore governed by the Commission's rules concerning rule making comments. Rather, it avers that the governing rule provision is Section 1.106 which provides for the grant of reconsideration requests which rely on new facts when it has been determined that consideration of the facts is in the public interest. Petitioner reiterates that the public interest requires consideration of the new allotment scheme since it will allow a substantial increase in service at minimal cost. It goes on to argue that it does not matter when the petitioning party could have discovered the facts or with what degree of diligence, because consideration of the new facts serves the public interest, not just the private interests of the petitioner. Jones goes on to state that it has not sought acceptance of its reconsideration request on the basis that the facts could not have been discovered earlier.[2] Therefore, it submits that SC's argument that the petition for reconsideration should be dismissed because the petitioner could have discovered the new facts previously are unresponsive and superfluous.

5. Petitioner also disputes SC's claim that the substitution of channels at Scranton would have any adverse impact on the potential Scranton applicants. It states that there would be no delay in the processing of the applications since any acceptable facilities proposed for Channel 275A could also be used for Channel 286A, thus requir-

ing the applicants to amend their applications only as to the channel of operation. Petitioner believes that SC may be concerned about the cost or difficulty in amending its own application. Therefore, if the application filing window for Channel 275A at Scranton closes before this rule making is concluded, petitioner states that it will pay the reasonable and necessary expenses incurred by the Scranton applicants in amending their applications to specify Channel 286A, even though it is unsure as to whether it has such an obligation. Finally, petitioner states that adoption of its proposal will have no adverse effect on any party. Rather, it submits that adoption of the proposal will provide Surfside Beach with its first wide-area service without any cost to SC or any other party, without a delay in the provision of a first service at Scranton, without causing economic harm from competition, and without compromising the Scranton licensee's technical facility in any way. Therefore, petitioner argues that, even if SC's disputed procedural arguments are sound, a denial of its petition for reconsideration would inexcusably exalt form over substance at the expense of the public interest.

6. After carefully considering the arguments presented by both the petitioner and SC, we find that the petition for reconsideration should be denied. First, Section 1.429 of the Commission's Rules governs the filing and consideration of petitions for reconsideration in notice and comment rule making proceedings. *See* Section 1.106(a)(1). However, like Section 1.106, Section 1.429 also permits grant of a reconsideration request based on facts not previously presented to the Commission where: (1) the facts relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission; (2) the facts relied on were unknown to the petitioner until after the last opportunity to present them and he could not have learned of the facts through the exercise of ordinary diligence; or (3) the Commission determines that consideration of the facts relied on is required in the public interest. However, we find that the petitioner has presented no reason to justify a grant of reconsideration. The new "facts" on which the petition for reconsideration relies are nothing more than that there is a possibility of a substitution of channels at Johnsonville which would permit the allotment of a different channel at Scranton. The petition fails to demonstrate that these "facts" relate to events or circumstances which have changed since the record closed or that the "facts" could not have been known in a timely fashion through the exercise of ordinary diligence. Although petitioner contends that it could make the showing that the new allotment scheme was discovered only through extraordinary diligence, we find that it has not done so here. It merely states that the allotment scheme "sprung from the extraordinary diligence of a licensee eager to provide improved service." We do not believe the discovery of an allotment scheme which might make possible the upgrade of a station requires extraordinary diligence, nor will we allow the "fact" of discovery to constitute a changed fact sufficient to warrant reconsideration.

7. We reject Jones' claim that, notwithstanding the absence of new facts and of ordinary diligence in the discovery of those facts, reconsideration would serve the public interest. Jones' proposal for Johnsonville, because it involves a community not originally identified in the *Notice* as a subject of this proceeding, is a counterproposal. As stated in the *Notice* and Section 1.420 of the Commission's Rules, that counterproposal should have been advanced no later than the date for filing initial comments in this proceeding. Although we agree with Jones that this concern is primarily procedural, we do not agree with Jones' contentions that Section 1.420 does not govern this case, that our procedural concern elevates form over substance at the expense of the public interest, and that no party would be harmed by overlooking this concern. First, although Jones' petition for reconsideration was not filed pursuant to Section 1.420 of our Rules, but instead pursuant to the "public interest" exception of Section 1.429(b)(3) of the Rules, we do not believe it would serve the public interest to consider, in the context of reconsideration, a request that we would have been constrained not to consider had it been advanced in contravention of Section 1.420 prior to our *Report and Order* in this proceeding. To do so would effectively eviscerate Section 1.420, and provide an incentive for the filing of late counterproposals in the guise of petitions for reconsideration. Therefore, we will not construe Section 1.429(b)(3) as authorizing what amounts to a waiver of Section 1.420, but instead will read the two provisions as complementary. Second, adherence to Section 1.420 does not elevate form over substance at the expense of the public interest. Indeed, were we to now consider and adopt a proposal involving a change in the Table of Allotments at Johnsonville in this proceeding, our action might well violate the notice and comment provisions of the Administrative Procedure Act (*APA*), because the notice in this proceeding expressly stated that we would only consider counterproposals if advanced in initial comments. Any action to the contrary would be beyond the scope of the *Notice* in this proceeding. Finally, we cannot properly conclude that the requested action would harm no interested person, because the public has not been placed on notice that a channel change at Johnsonville might be effected in this proceeding.

8. Accordingly, based on the above discussion, IT IS ORDERED, That the petition for reconsideration filed by Jones, Eastern of the Grand Strand, Inc. IS DENIED. However, petitioner's request for rule making (RM-6448) proposing the identical channel changes as sought herein will be the subject of a separate Notice of Proposed Rule Making.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
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FOOTNOTES

[1] Approximately one month after filing the instant petition for reconsideration, Jones filed the identical proposal as a new petition for rule making (RM-6448).

[2] Although petitioner states that its petition for reconsideration is not premised on Section 1.106(c)(1), it contends that such a showing could be made. In support, it states that the rule does not require a showing that the new facts could not possibly have been discovered earlier, only that they could not have been discovered through the exercise of ordinary diligence. It contends that ordinary diligence was used in considering possible options prior to the filing of the petition for rule making and in response to the counterproposals. However, according to the petitioner, the present "highly attractive" scheme was only discovered by the exercise of extraordinary diligence.

Before the
Federal Communications Commission
Washington, D.C. 20554

Report No. CL-379

In the Matter of

The Need to Promote Competition
and Efficient Use of Spectrum for
Radio Common Carrier Services
(Cellular Interconnection
Proceeding)

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: February 15, 1989; Released: March 15, 1989

By the Commission:

INTRODUCTION

1. On May 18, 1987, we released a *Declaratory Ruling* (*Ruling*), 2 FCC Rcd 2910 (1987), in the above-captioned proceeding, which clarified the policies established in *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Memorandum Opinion and Order* (*Interconnection Order*), 59 Rad. Reg. 2d (P&F) 1275 (1986). Petitions for reconsideration and clarification of the *Ruling* were filed by the Texas Nonwireline Carriers Serving Dallas, Houston, Austin, San Antonio and El Paso (TNC); New York Telephone Company and New England Telephone and Telegraph Company (NYNEX); BellSouth Corporation (BellSouth); and Southwestern Bell Telephone Company (SWB). Responsive pleadings were filed by Cellular Telecommunications Industry Association (CTIA), McCaw Communications Companies, Inc. (McCaw), CyberTel Corporation (CyberTel), The Cellular Telecommunications Division of Telocator Network of America (Telocator/Cellular), The Paging Division of Telocator Network of America (Telocator/Paging), Jubon Engineering, Inc. (Jubon), TNC, The Ameritech Operating Companies (Ameritech), SWB, NYNEX, and BellSouth.[1]

2. The *Ruling* clarified our policies regarding the interconnection of cellular and other radio common carrier facilities to the landline telephone network, and provided guidance to telephone companies and cellular operators in their interconnection negotiations. In addition, it resolved some of the jurisdictional questions involved in examining interconnection. The petitions and responsive pleadings request that we revisit many of the issues contained in the *Ruling*. For the reasons presented below, we reaffirm our interconnection policies, and further clarify our guidelines for interconnection arrangements and negotiations between local exchange carriers (LECs) and public mobile service licensees.

DISCUSSION

Jurisdiction over NXX Codes

3. In the *Ruling*, we held that we have plenary jurisdiction over the allocation of NXX codes.[2] We recognized that, as a practical matter, it is impossible to allocate one set of NXX codes for intrastate calls and one set for interstate calls. In addition, we noted that any state regulation of NXX codes could affect interstate communications by disrupting the uniformity of the North American Numbering Plan, which has established the codes as a national resource of the United States and Canada. For these reasons, we stated that we would assert jurisdiction over the rights of cellular carriers to obtain and use NXX codes. However, based on the evidence in the record, we found that the costs of allocating the codes can be separated, and thus we asserted jurisdiction over only the interstate portion of the costs and charges for NXX codes.

4. TNC requests that we assert plenary jurisdiction over all the charges assessed by the Bell Operating Companies (BOCs) on cellular carriers for assigning NXX codes. It argues that the assignment of NXX codes is neither a communications service nor a common carrier service subject to the jurisdictional limitations of Section 2(b) of the Communications Act. According to TNC, the assignment of NXX codes may be analogized to the provision of inside wiring, and to billing and collection services, which are two activities determined not to be common carrier communications services subject to Section 2(b). TNC also contends that there is no practical way to segregate intrastate and interstate costs of NXX code assignments. [3]

5. Telocator/Cellular, Telocator/Paging, McCaw and Jubon agree with TNC that the Commission has the authority to assert plenary jurisdiction over all NXX code charges. If the Commission declines to assert such jurisdiction, Telocator/Paging argues, "the BOCs may be able to impose excessive charges for NXX codes that are not cost-based, claiming that the amounts are necessary to cover intrastate allocations and purporting to rely on state regulation." Telocator/Paging Reply at 5. Therefore, Telocator/Paging contends, failure to assert plenary jurisdiction over NXX code assignment charges could be detrimental to the Commission's pro-competitive policies. In its reply, TNC also argues that, without the Commission's assertion of full jurisdiction over NXX costs and charges, the landline telephone companies will attempt to assess exorbitant NXX code charges on non-wireline cellular carriers.

6. SWB opposes TNC's petition, arguing that the assignment of NXX codes is a common carrier service, and that the Commission should not assert plenary jurisdiction over NXX code charges. First, SWB contends that the assignment of NXX codes is not analogous to the provision of inside wiring or to billing and collection services. Second, SWB disputes TNC's claim that it is impossible to separate the interstate and intrastate components of BOC costs and charges associated with NXX code assignment. On the contrary, SWB argues, NXX code assignment costs are separated between jurisdictions using Part 67 of the Commission's Rules.[4]

7. The Communications Act (Act) establishes a bifurcated jurisdictional scheme for the regulation of interstate and intrastate communications. Under Section 2(a) of the Act, the Commission has jurisdiction over "all interstate and foreign communication by wire or radio . . . which originates and/or is received within the United States . . ."

47 U.S.C Section 152(a). Section 2(b)(1) of the Act restricts the Commission's jurisdiction with regard to charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier. 47 U.S.C. Section 152(b)(1). Consistent with these statutory provisions and court decisions interpreting them, the *Ruling* noted that this Commission has authority over interstate charges for common carrier services, while the states regulate intrastate charges, unless they are inseparable.[5]

8. We find that the *Ruling* correctly followed our statutory mandate and precedent in holding that the costs of allocating NXX codes can be separated and, therefore, only the interstate component of the charges for NXX codes will be regulated by this Commission. Initially, we reject TNC's argument that the BOC assignment of NXX codes is not a common carrier service subject to Section 2(b) of the Act. The assignment of NXX codes is integrally intertwined with the provision of common carrier interconnection arrangements. Without the assignment of numbers, interconnection arrangements would be meaningless, since cellular and RCC carriers could not provide common carrier service without them. Because an NXX code can only be obtained through a local telephone company, the provision of NXX codes is not subject to competition as was the case with billing and collection services and inside wiring.[6] Second, as the allocation of NXX codes is an aspect of common carrier service, our jurisdiction over the charges for the NXX code assignment is limited by Section 2(b) of the Act.[7] Contrary to TNC's assertion, which was not supported by evidence, such charges can be allocated between intrastate and interstate jurisdictions pursuant to the separations process set forth in Part 36 of our Rules.[8] Under these circumstances, preemption of state regulation of the intrastate component of NXX code charges is unwarranted.[9]

9. In regard to TNC's and Telocator/Paging's contentions that a dual regulatory structure for NXX code costs may result in the BOCs' imposition of excessive charges on non-wireline cellular carriers, we take this opportunity to reaffirm our position concerning just and reasonable interconnection rates. If intrastate pricing unduly affects interstate interconnection rights, we will consider taking appropriate steps, which, if necessary, could include preemption of certain aspects of state regulation. *See Ruling* at para. 18.

Good Faith Negotiation Policy

10. The *Cellular Communications Systems Orders* [10] held that telephone companies and cellular operators must negotiate the particular arrangements involved in interconnecting a given cellular system, and such arrangements should be made the subject of an intercarrier agreement. Consistent with this holding, the *Interconnection Order, Policy Statement* [11] indicated that the terms and conditions of interconnection are to be negotiated in "good faith" between the landline company and the cellular carrier. Our *Ruling* reaffirmed this good faith negotiation policy, adding that "we expect that tariffs reflecting charges to cellular carriers will be filed only after the co-carriers have negotiated agreements on interconnection." *Ruling* at para 56.

11. The SWB petition seeks clarification of the *Ruling*'s good faith negotiation policy. Specifically, SWB maintains that our statement regarding the filing of tariffs "only after the co-carriers have negotiated agreements on interconnection" can be interpreted to require LECs and cellular carriers to reach agreement on all aspects of cellular interconnection before the telephone company files any proposed interstate or intrastate cellular interconnection tariffs. Such an interpretation, it contends, fails to recognize that each party may conduct the negotiations in good faith, and yet be unable to reach an agreement on some issues. For example, SWB asserts, if regarded as an absolute requirement, our statement would mean that:

> [E]ven if a BOC and four out of five affected [cellular carriers] agreed on nine out of ten issues, the BOC nevertheless could not file a proposed tariff. The BOC could not even file a tariff embodying stipulated approaches on nine issues, with the request that a hearing be ordered on only the one unresolved issue.

SWB Reply at 6. For these reasons, it argues, the Commission should clarify that LECs and cellular carriers must conduct good faith negotiations, but do not have to reach an agreement prior to the telephone company's filing of proposed tariffs.[12]

12. CTIA, Telocator/Cellular, and McCaw argue that clarification of our good faith negotiation policy is unnecessary. Telocator/Cellular objects to SWB's interpretation that our statement permits the filing of a telephone company tariff regardless of whether the negotiating parties have reached an actual agreement on the terms of that tariff. It argues that this interpretation directly contradicts the clear import of our holding that landline carriers are expected to file tariffs reflecting charges to cellular carriers "only after" an interconnection agreement has been negotiated. Similarly, CTIA contends, allowing the telephone company to file tariffs prior to reaching an agreement would undermine the good faith negotiation policy. CTIA explains that cellular carriers will have little leverage in negotiating with landline companies that can unilaterally file interconnection tariffs if the cellular carrier disagrees with the landline company's terms.

13. To understand the meaning of the *Ruling*'s statement that "we expect" tariffs to be filed "only after" cellular carriers and landline companies have negotiated interconnection agreements, it is important to focus on the context in which this pronouncement was made. In the record at that time, the evidence showed that on occasion landline companies had failed to negotiate in good faith. For example, it had been alleged that some landline companies filed unilateral tariffs imposing their own terms, and that negotiations conducted subsequent to a tariff filing were usually meaningless. *See Ruling* at para. 54. The landline companies denied these assertions, claiming that they had negotiated in good faith, and that cellular carriers often failed to concur on the terms of interconnection agreements. Our statement regarding "pre-tariff negotiation agreements" was intended to reflect our recognition that, as CTIA suggests, if a telephone company is able to file tariffs before reaching an interconnection agreement, a cellular carrier's bargaining power will be diminished. However, we also acknowledge that, as SWB comments, landline companies and cellular operators may sincerely negotiate in good faith, and still fail to agree on all issues. Faced with these competing goals, we reaffirm that tariffs should not be filed before the co-

carriers have conducted good faith negotiations on an interconnection agreement, but clarify this requirement to the extent enunciated below.

14. In response to the example posited by SWB, we note that, under our "pre-tariff negotiation agreement" policy, we would not expect the BOC to file a tariff pertaining to the "unresolved issue." To interpret our statement otherwise in the context of SWB's hypothetical example would mean that, when an impasse is reached, the landline company could proceed unilaterally to file its tariffs, thereby rendering meaningless the negotiations already conducted on this matter. On the other hand, it may be appropriate for the BOC to file tariffs on the uncontested issues. We observe, though, that a landline company's filing of a tariff before an interconnection agreement has been negotiated could indicate a lack of good faith.

15. However, the instant proceeding is not the appropriate forum in which to determine whether a particular tariff filing constitutes bad faith in negotiating. Rather, we will review specific factual disputes on a case-by-case basis. Although the *Ruling* was intended to provide guidance to LECs and cellular operators in negotiating reasonable interconnection agreements, we anticipated the need in some cases for Commission intervention to assist carriers in resolving their differences. To further our goal of bringing cellular service to the public in an expeditious manner, we have been, and remain, willing to meet informally with landline and cellular carriers to discuss the settlement of contested issues, and, in turn, to avoid the filing of complaints.[13] Should negotiations reach an impasse, and informal meetings fail, allegations regarding compliance with our good faith negotiation policy may be brought before the Commission pursuant to Section 208.[14]

Jurisdiction over Good Faith Negotiations

16. The *Ruling* found that, under Section 2(a) of the Act, this Commission has plenary jurisdiction to require cellular interconnection negotiations to be conducted in good faith. We based this assertion of jurisdiction on Section 201 of the Act, which imposes a duty on every common carrier to furnish its services upon reasonable request, and on Section 202, which prohibits "unreasonable discrimination" in the provision of interstate common carrier services. We interpreted these sections of the Act as mandating common carriers to negotiate the provision of their services in good faith, and we held that the conduct of interconnection negotiations cannot be separated into interstate and intrastate components because failure to reach an interconnection agreement for intrastate services also precludes interconnection for interstate services. We stated:

> Good faith cannot be quantified and allocated according to relative interstate and intrastate use. Furthermore, any state regulation which permits departures from our good faith requirement could severely affect interstate communications by preventing cellular carriers from obtaining interconnection agreements and consequently excluding them from the nationwide public telephone network.

Ruling at para. 21. Also, we noted that our jurisdiction to require good faith negotiations is also derived from Sections 309(a) and 314 of the Act, and Section 11 of the Clayton Act, which authorize this Commission to remedy anticompetitive conduct. *Ruling* at para. 22. During cellular interconnection negotiations, a carrier may exhibit anticompetitive conduct by causing delays in the negotiating process, which in turn would delay service to the other party's customers and place them at a competitive disadvantage vis-a-vis other LECs.

17. BellSouth disputes our assertion of plenary jurisdiction to require interconnection negotiations to be conducted in good faith. It seeks clarification or reconsideration of the *Ruling* to hold that the question of what constitutes bad faith is separable between federal and state jurisdictions. According to BellSouth, jurisdiction over the issue in the underlying controversy should determine the proper forum to resolve allegations of bad faith. For example, it maintains, complaints alleging bad faith negotiations concerning interstate interconnection rates should be within the purview of the Commission, while allegations of bad faith negotiations related to local rates should be within state jurisdiction.

18. CTIA, McCaw and CyberTel oppose BellSouth's request to clarify or reconsider our jurisdiction over the conduct of cellular interconnection negotiations. They argue that the determination of good or bad faith in the negotiation process cannot be separated into interstate and intrastate components. Also, they contend, the Commission correctly asserted jurisdiction because inconsistent state regulation may impede interstate communications. According to CTIA, a telephone company's bad faith in negotiations concerning intrastate interconnection rates could adversely affect a cellular carrier's ability to participate in the nationwide telephone network, and the Commission has jurisdiction to determine whether a given dispute will affect interstate communications.

19. We reaffirm that we have plenary jurisdiction to establish a policy which requires the terms and conditions of cellular interconnection to be negotiated in good faith. Contrary to BellSouth's contention, we find based on the record that the conduct of good faith negotiations is not jurisdictionally severable. We reject BellSouth's argument that the jurisdiction over allegations of bad faith should be the same as the jurisdiction over the issue in the underlying controversy. Rather, we agree with the cellular oppositions that, for example, a landline company's lack of good faith in negotiations regarding intrastate charges may ultimately prevent a cellular carrier from obtaining an interconnection agreement, which clearly is a matter within this Commission's purview. Bad faith and good faith cannot be separated in the context of a single agreement. If a carrier is negotiating in bad faith with regard to a portion of an interconnection agreement, it is negotiating in bad faith with regard to the whole agreement. In practice, parties often refuse to enter into any agreement until they agree on all terms in the contract. As a practical matter, failure to negotiate in good faith with respect to intrastate rates would frustrate entering into an interconnection agreement. Therefore, the good faith negotiation requirement cannot be severed, and this Commission has plenary jurisdiction. However, we emphasize that, in addressing complaints alleging bad faith negotiation, we are concerned only with determining whether a carrier's particular conduct constitutes bad faith and whether the

lack of good faith could impede interstate communications, rather than whether the intrastate rates are lawful. That is, we will not exercise our jurisdiction over the underlying dispute over interconnection to also regulate intrastate rates. The state is the appropriate forum for the resolution of financial arrangements related solely to intrastate communications.[15]

Mutual Compensation

20. The *Ruling* recognized that in Type 2 interconnection, in contrast to Type 1 interconnection,[16] cellular carriers perform their own switching functions, and thus should benefit from a mutual compensation policy, which allows each cellular and landline carrier to recover its actual costs of switching traffic for the other carrier. Specifically, we found that such a policy is necessary because a Type 2 cellular carrier performs switching functions to terminate land-to-mobile traffic, just as a landline company terminates mobile-to-land traffic.

21. NYNEX, BellSouth, and Ameritech[17] (collectively referred to as BOCs) seek reconsideration of our mutual compensation policy on several grounds. First, NYNEX and BellSouth contend that our *Ruling*'s support of mutual compensation arrangements is inconsistent with the Commission's decision in *Indianapolis Telephone Company v. Indiana Bell Telephone (Indianapolis), Memorandum Opinion and Order*, 1 FCC Rcd 228 (Com. Car. Bur.1986); *Memorandum Opinion and Order*, 2 FCC Rcd 2893 (1987).[18] Under *Indianapolis*, BellSouth argues, reasonable interconnection does not require a financial arrangement equivalent or similar to arrangements between local landline telephone companies, as the *Ruling* suggests. According to BellSouth, the Commission should not look to financial arrangements between the BOCs and independent telephone companies (ITCs) to evaluate the reasonableness of cellular interstate interconnection agreements because a distinction should be made between "landline carriers providing basic telephone service of last resort, and cellular carriers which are providing a specialized mobile service." BellSouth Petition at 9. It contends that, even if cellular carriers are treated like ITCs, mutual compensation is inappropriate. BellSouth maintains that the Commission's pro-competitive goals would be better promoted by requiring cellular companies to recover their costs either from end users or interexchange carriers. It explains that BellSouth has been developing new compensation agreements with ITCs whereby each carrier recovers the costs of the facilities it provides, and mutual compensation is eliminated. In light of these revised agreements, and the fact that it plans to modify its interstate access tariff, BellSouth asserts that we should not impose a mutual compensation policy for cellular interconnection.

22. NYNEX argues that it should be exempt from the mutual compensation policy because it currently does not charge cellular carriers interstate rates for interconnection. Specifically, NYNEX asserts, it should not be obligated to compensate cellular operators that perform switching because NYNEX performs two switching functions per call. In a series of examples, it attempts to demonstrate that NYNEX telephone companies charge only intrastate rates for cellular interconnection. Claiming that it receives numerous requests from cellular carriers concerning the application of the *Ruling*'s mutual compensation guidelines, NYNEX requests that we clarify that these guidelines do not apply to its intrastate rate filings. Rather, NYNEX contends, the terms of its state interconnection tariffs should be reviewed by the state regulatory commission. Similarly, Ameritech, in its reply, claims it does not charge Type 2 cellular carriers for the switching functions performed for interstate traffic, and thus the mutual compensation requirement is inappropriate with regard to the Ameritech Operating Companies.

23. CTIA, Telocator/Cellular, McCaw, and CyberTel (collectively referred to as cellular oppositions) regard the BOCs' mutual compensation arguments as evidence that the landline companies are unwilling to recognize fully the status of cellular companies as co-carriers. They contend that cellular companies and the BOCs are entitled to mutual compensation based on the costs incurred in switching traffic. CTIA states that the NYNEX companies' tandems transport and switch interstate traffic originated and terminated by cellular carriers, and cellular carriers transport and switch interstate traffic carried over the NYNEX tandems. It argues that since the NYNEX interconnection facilities are used to transport interstate calls, the Commission has jurisdiction over those facilities, and NYNEX cannot disclaim this jurisdiction by filing an intrastate tariff. Similarly, CTIA asserts, despite BellSouth's plans to revise its compensation agreements, BellSouth's tandems transport and switch interstate traffic originated or completed by cellular carriers, and cellular companies transport and switch interstate traffic carried over BellSouth's tandems.

24. In addition, the cellular oppositions dispute the BOCs' claims that mutual compensation for switching costs is not justified because the cellular carrier can recover its costs from its customers. They maintain that the financial arrangements between a cellular company and its subscribers have no bearing on whether a landline company is obligated to compensate a cellular carrier for the costs of terminating a land-to-mobile call.

25. We disagree with the contentions that the *Ruling* is inconsistent with the decision in *Indianapolis*, *supra*. In *Indianapolis*, we stated our position that compensation arrangements between cellular carriers and landline telephone companies relating to solely intrastate communications are properly left to negotiations between the carriers or, in the end, may be subject to state regulatory jurisdiction. Given that the *Indianapolis* complaint proceeding involved financial arrangements governing wholly intrastate interconnection, we held that this Commission was not the appropriate forum for resolution of the complaint. In recognition of the dual jurisdiction regarding compensation arrangements, our *Ruling* distinguished *Indianapolis*.[19] In the instant proceeding, we are only concerned with mutual compensation between telephone companies and cellular carriers for interstate switching costs, a matter clearly within the purview of this Commission. Therefore, the BOCs' reliance on *Indianapolis* in no way relieves them of their obligation to comply with the principle of mutual compensation.

26. Contrary to BellSouth's contentions, our *Ruling* neither mandates that cellular carriers are entitled to interconnection compensation arrangements that are virtually identical to those between BOCs and ITCs, nor treats such arrangements as the only measure of the reasonableness of a particular financial agreement. Rather, we stated that:

> Should a carrier file a complaint involving interstate switching costs or charges, we will judge the appropriateness of the given arrangement using as a *guide*

> the existing compensation agreements of connecting BOCs and ITCs. Should telephone companies impose charges on a cellular carrier that differ from the charges they impose on each other, there may be discrimination under Section 202(a) of the Act. In that event, we will require the BOC to make an affirmative, documented showing of why it has imposed differing charges on the two carriers.

Ruling at para. 49 (emphasis added). We believe that the mutual compensation principle promotes our goal of entitling cellular carriers to interconnection on a similar basis as the ITCs, which routinely receive compensation for switching from other LECs. For this reason, our *Ruling* correctly held that cellular carriers and telephone companies are equally entitled to just and reasonable compensation for their provision of interstate access, whether through tariff or by a division of revenues.

27. Moreover, we reject NYNEX's argument that mutual compensation for switching is inappropriate because the cellular operator may be recovering its costs from its subscribers. Rather, we agree with the cellular oppositions that a cellular carrier's subscriber rates, or the costs recovered, are not germane to the issue of mutual compensation arrangements between co-carriers. We are concerned that a cellular carrier may employ its mobile telephone switching office (MTSO) to originate mobile calls directed to landline customers, and to terminate landline calls destined for cellular subscribers. Since such a situation involves a co-carrier using its own facilities to originate and complete traffic, a landline company is required to compensate a cellular operator for the switching costs incurred in terminating a call from a landline to a mobile unit. We reiterate our position that, under the reasonable interconnection standard, interstate switching charges should be cost-based. A cost-based compensation system will permit telephone companies and cellular carriers to recover their respective costs of switching interconnected interstate calls, and a just and reasonable rate of return on investment.

28. Furthermore, we believe that the BOCs' challenge to the principle of mutual compensation for cellular interconnection is tantamount to a challenge to the concept of cellular systems as co-carriers. For this reason, we remind the landline companies of our longstanding policy that a cellular system operator is a common carrier, not a customer or end user. In one of our first pronouncements regarding our interconnection policies, we held that, as a co-carrier, a cellular company is entitled to interconnection arrangements that minimize duplication of switching facilities and, in turn, the costs to consumers.[20] We continue to believe that reciprocal switching agreements and mutual compensation arrangements serve the public interest.

29. Finally, we deny the BOCs' requests to clarify or reconsider our mutual compensation policy, or to rule on the applicability of this policy to a landline company's particular factual circumstances. As previously stated, the *Ruling* clarified our interconnection policies and provided guidelines for negotiations between telephone companies and cellular operators. In fact, we declined to address any allegations raised insofar as they related to specific parties, and we refused to speculate on how various interconnection agreements could be structured. Similarly, the parties have provided no evidentiary basis on which to decide whether the particular interconnection arrangements or compensation systems described by NYNEX, BellSouth and Ameritech may, in some way or at some time, exempt these telephone companies from our mutual compensation standard. We expect the landline companies to observe our mutual compensation principle, and we are prepared to consider the unique circumstances of a carrier's operations on a case-by-case basis. Allegations concerning compliance with our compensation policies can be brought to this Commission either in an informal setting or in an enforcement proceeding pursuant to the complaint process of Section 208, as discussed above.

Costs of Type 1 and Type 2 Interconnection

30. The *Ruling* found that certain distinctions between Type 1 and Type 2 interconnection[21] produce differences in their respective costs. For example, we explained, the Type 2 design eliminates the need to utilize a duplicative switching center, thereby resulting in cost savings for the telephone company. In addition, we concluded, cellular carriers choosing Type 2 do not need to purchase certain ancillary services, such as operator assistance, which are tied to Type 1 interconnection. Based on these findings, the *Ruling* held that, in most circumstances, it should be less expensive to provide Type 2 than Type 1 interconnection, and thus cost-based charges for Type 2 service should be lower. We added that a telephone company's imposition of switching charges that fail to distinguish between Type 1 and Type 2 service may be unjustly discriminatory in violation of Section 202(a) of the Act, depending on the facts of a given case. *Ruling* at 46-49.

31. NYNEX, BellSouth and SWB seek reconsideration or clarification of our findings pertaining to the relative costs of Type 1 and Type 2 interconnection. According to the BOCs, it is not necessarily less expensive to provide Type 2 instead of Type 1. NYNEX objects to the *Ruling*'s "presumption" that interstate rates for Type 2 should be lower than the interstate rates for Type 1. NYNEX Petition at 7. In the area served by the NYNEX telephone companies, it argues, the same number of LEC switching centers are involved in a typical Type 1 call as in a Type 2 call, and thus Type 1 interconnection is not always more costly to provide than Type 2. BellSouth acknowledges that, for interstate calls, Type 2A interconnection should be less expensive than Type 1, but maintains that, for local calls, the cost of providing Type 2A interconnection should be about the same as the cost for Type 1. SWB indicates that, during negotiations, certain cellular carriers have argued that the Commission's findings regarding Type 2 interstate costs should also apply to intrastate costs, and hence seeks clarification that intrastate rates for Type 2A cellular interconnection may not be lower than intrastate Type 1 rates.

32. CTIA, Telocator/Cellular, McCaw, and CyberTel oppose the BOCs' request for reconsideration or clarification of our cost findings regarding Type 1 and Type 2 interconnection. According to the cellular oppositions, the Commission properly concluded that the costs of Type 2 interconnection should be lower than the costs of Type 1. They support the *Ruling*'s presumption that Type 2 charges will generally be lower in light of the engineering efficiencies typically afforded by Type 2 interconnection. CTIA responds to SWB's request for clarification relating to intrastate Type 2A rates by stating that the Commission limited its jurisdiction to the interstate component of switching and interconnection rates, and thus

clarification is unwarranted. Lastly, while CyberTel supports our conclusions regarding the relative costs of Type 1 and Type 2, it advises that a finding of lower costs for Type 2 should be based, not only on the rationale that a switch is routinely eliminated when converting from Type 1 to Type 2, but also on other cost considerations.

33. The arguments presented by the BOC pleadings have not persuaded us that our conclusions regarding the relative costs of Type 1 and Type 2 interconnection require clarification or reconsideration. We find no need to analyze the kinds of interconnection arrangements that may, as NYNEX and BellSouth suggest, constitute exceptions to our finding that Type 2 may be less costly because we held only that "in most circumstances" it should be less expensive to provide Type 2 interconnection. *Ruling* at para. 34. We left open the possibility of exceptions that could alter our cost analysis and lead to a different conclusion. We consistently have recognized the existence of a variety of interconnection arrangements and system designs,[22] and consequently have not made universal statements concerning the relative costs of these various forms of interconnection. Indeed, that is the reason that we have been proceeding by policy statement rather than by Rule Making. However, we caution landline carriers not to discourage a cellular carrier's selection of Type 2 service by charging Type 2 rates that are not cost-based. Reasonable interconnection means a cellular carrier may choose Type 1 or Type 2, depending on which form is appropriate to its system design, among other factors. Type 2 interconnection is technically feasible, and cellular carriers often prefer Type 2 because of its superior technical capabilities. Thus, our statements that Type 2 interconnection should generally be less expensive were intended as a reminder to carriers, not only that Type 2 should be made available to cellular carriers, but also that Type 2 should be offered at reasonable rates. Our goal is to assure that cellular companies are able to select the less costly form of interconnection.

34. Furthermore, we deny SWB's request to clarify that intrastate Type 2A interconnection costs may not be lower than intrastate Type 1 costs. Clearly, these intrastate rates are a matter within the purview of the state regulatory commissions, and we will not render any rulings or interpretations in this regard. *See* para. 25, *supra*. NYNEX, also, in an effort to demonstrate that Type 1 interconnection is not necessarily more costly than Type 2, has provided us with a detailed description of the switching centers and the routing of calls in its region. As indicated earlier, this generic proceeding is not the appropriate forum in which to evaluate specific factual circumstances that may arise. For the foregoing reasons, we reaffirm that, in most cases, the provision of Type 2 interconnection should be less expensive than the provision of Type 1.

Six - Month Policy

35. In the *Ruling*, we recognized that a telephone company may experience delays in providing Type 2 interconnection to a cellular carrier because of, for example, the unavailability of necessary equipment or the need to lay cable. However, the evidence showed that, even considering such delays, a landline carrier should need no more than six months to provide Type 2 interconnection to a cellular system. Given this finding, we concluded that, once a cellular carrier requests Type 2, six months is the maximum length of time required by a telephone company to complete the Type 2 connections.

36. SWB requests clarification of this six-month policy for Type 2 interconnection. First, SWB argues that, although six months may be an appropriate length of time in which to provide Type 2A interconnection, it is inappropriate for Type 2B since the telephone industry has less experience with this form of interconnection than with Type 2A. Second, SWB asks that the six-month policy not apply in certain circumstances beyond the control of the landline carrier. Specifically, SWB seeks an exception to the six-month policy when a cellular carrier's service request (1) substantially exceeds the service forecast that has been provided by the cellular carrier to the telephone company, (2) is not in accordance with the landline carrier's technical capabilities to record and bill special services, (3) is not in accordance with the telephone company's ability to forward a calling number to services requiring such information (*e.g.* Emergency 911, Operator Services), and (4) is in a less populated area where the landline carrier would have to construct additional LEC facilities to meet the cellular carrier's service needs.[23] According to SWB, creating exceptions to the six-month rule for Type 2B,[24] and for the other circumstances, will probably reduce the number of complaints alleging unreasonable delay that may be filed with the Commission.

37. CTIA, Telocator/Cellular, and McCaw object to SWB's request for modification of the six-month policy. They argue that the Commission should not create exceptions to its six-month policy, either for Type 2B or for the other situations presented by SWB, because any exemption may be used by a landline carrier as an excuse to delay the provision of interconnection requested by a cellular system. According to the cellular oppositions, delays in providing Type 2 generally are not justified because the telephone industry is sufficiently familiar with both the Type 2A and Type 2B forms of interconnection. However, CTIA adds, in the few instances when a landline carrier legitimately requires more than six months to provide Type 2, the particular circumstances resulting in the delay should be considered as mitigating factors if a complaint is filed. McCaw contends that "in most cases, the provision of Type 2 connections should take far less than six months." McCaw Opposition at 9.

38. We find that arguments against our six-month policy are unpersuasive, and thus deny SWB's request to modify our findings in this regard. The six-month timeframe was intended to give telephone companies guidance on what constitutes a reasonable length of time in which to provide a cellular carrier with its requested form of interconnection. This guidance was necessary because, while we had previously held that landline carriers were expected to furnish "appropriate interconnection to cellular systems upon reasonable demand",[25] we had not addressed the question of how rapidly a particular form of interconnection should be provided once chosen by a cellular carrier. The *Ruling*'s conclusion that six months should be the maximum period of time needed to complete Type 2 connections is supported by the record compiled in this proceeding, and we find no justification to revise this policy. We agree with the cellular oppositions that, in general, the BOCs have an adequate degree of

experience with Type 2 interconnection so as to enable them to provide this form within six months of a cellular carrier's request.

39. However, although we expect telephone companies to comply with our six-month guideline, we recognize that in rare cases extenuating circumstances may affect the timeliness of providing Type 2 interconnection. We will evaluate the specific factual circumstances on a case-by-case basis as they come before us.

System Design

40. BellSouth seeks clarification of the *Ruling* on the basis that our discussion of the "reasonable interconnection" standard seems to take into account only the system design of the cellular carrier, but not the system design of the landline network. It maintains that, because the majority of cellular traffic is local, it may be unreasonable from an "overall system design" viewpoint to provide a single Type 2A interconnection to a cellular carrier. BellSouth Petition at 6. According to BellSouth, the Commission should consider the overall system design, and should regard as "reasonable interconnection" either Type 1 alone, multiple Type 2A connections, or combinations of Type 1 and Type 2A.[26]

41. CTIA, Telocator/Cellular, and McCaw oppose BellSouth's request for clarification related to system design and reasonable forms of interconnection. They acknowledge that cellular carriers should consider the landline network system design in determining the reasonableness of a particular form of interconnection. But, CTIA states, the cellular carrier is responsible for its system design, and "BellSouth apparently hopes to place itself in the position of determining what is best for the cellular carrier in the name of protecting the [telephone] network . . . ." CTIA Opposition at 26. It adds, the cellular system design should be given significant weight in deciding whether a requested type of interconnection is reasonable. Were the telephone company to dictate a cellular system design, CTIA contends, control of the cellular system would no longer be in the hands of the licensee. Similarly, Telocator/Cellular argues that the landline companies would not satisfy the Commission's requirements by offering cellular carriers only the types of interconnection that the BOCs believe should be provided. Telocator/Cellular Opposition at 10, n. 26. The cellular oppositions also recognize that there may be instances when forms other than a single Type 2A interconnection may be more reasonable. As Telocator/Cellular comments, multiple or combined forms of interconnection may be "appropriate to achieve maximum network and economic efficiency." *Id.* However, under the Commission's policies, CTIA argues, a cellular carrier's request for Type 2A interconnection will be " *prima facie* reasonable, given the demonstrated technical feasibility of this form of interconnection." CTIA Opposition at 27. Also, McCaw claims that BellSouth "attempts to avoid reasonably requested Type 2 interconnection and to impose upon cellular carriers the form of interconnection that it desires." McCaw Opposition at 5, n.4.

42. Apparently, BellSouth has misconstrued our pronouncements in regard to "reasonable interconnection." The *Ruling* correctly followed our well-established interconnection policies in stating that the reasonable interconnection standard gives a cellular carrier the option of choosing Type 1 or Type 2, "whichever form is reasonably appropriate to its system design." *Ruling* at para. 29. Our reference to a cellular carrier's system design in no way suggests that other factors, such as the landline network's system design, are excluded from consideration in determining the reasonableness of a particular form of interconnection. On the contrary, the *Ruling*'s discussion of reasonable interconnection was based on precedent that explicitly referred to a variety of factors. For example, in *Cellular Communications Systems, supra*, 86 FCC 2d at 496, we indicated that "[t]he particular point of interconnection of a given cellular system will be dependent upon the design of the system and *other factors* which may vary from case to case . . . ." (Emphasis added.) Moreover, the *Policy Statement, supra*, at para. 3, stated that "[t]he terms and conditions of interconnection depend, of course, on *innumerable factors* peculiar to the cellular system, *the local telephone network*, and local regulatory policies . . . ." (Emphasis added.) Moreover, we do not take issue with BellSouth's assertion that, from an "overall system design" viewpoint, it may be more reasonable in some cases to provide a form of interconnection other than Type 2A. But we find no reason to clarify the *Ruling* in this regard because we have never required a particular form of interconnection for cellular systems.[27]

Radio Common Carriers

43. In the *Ruling*, we stated that the *Interconnection Order*, *Policy Statement*, and the *Ruling* itself, apply to all public mobile service licensees, and not only to cellular carriers. Therefore, our policies and guidelines are equally applicable to the interconnection issues and negotiations involving non-cellular radio common carriers (RCCs). Specifically, the *Ruling* held that the reasonable interconnection standard applies to all Part 22 licensees, including RCCs and, therefore, a telephone company must provide the type of interconnection reasonably requested by an RCC. Moreover, we indicated that telephone companies must accommodate the needs of RCCs for telephone numbers. Finally, the *Ruling* noted that compensation arrangements among telephone carriers and RCCs are largely a matter of state concern because RCCs are generally engaged in the provision of local, intrastate telephone service.

44. BellSouth, in its petition, and Ameritech, in is reply, seek reconsideration or clarification of the application of our interconnection policies to RCCs in certain respects. Regarding our policy that a telephone company provide reasonable interconnection to an RCC, BellSouth argues that, in most instances, it is unreasonable to provide a single Type 2A interconnection to paging carriers because "even a lower percentage of the paging transmissions, compared to cellular calls, are interLATA." BellSouth Petition at 11. It claims that such local paging traffic should not burden access tandems that are designed in the overall network for interLATA access or intraLATA toll calls. According to BellSouth, although reasonable interconnection generally should be provided to RCCs, in considering the efficiency of the overall network, it would be unreasonable to provide a single Type 2 interconnection to paging carriers.

45. Ameritech contends that central terminals for many RCC systems cannot function in the same manner as a cellular MTSO or a local exchange end office in regard to the rest of the local network. In light of the different technical abilities of the RCC terminals, Ameritech argues, "it is unfair to apply the Commission's rule that the BOCs have presumptively failed to negotiate Type 2 inter-

connect in good faith in the event such arrangements have not been consummated within six months." Ameritech Response to Petitions at 4. It maintains that, given the BOCs lack of experience in the provision of Type 2 interconnection to RCCs, additional time may be needed to implement such arrangements. Therefore, Ameritech requests reconsideration of our six-month policy as it applies to RCCs.

46. Telocator/Paging, CyberTel, and Jubon (collectively referred to as RCC oppositions) object to reconsideration or clarification of our Type 2 reasonable interconnection and six-month policies as they pertain to RCCs, and urge this Commission to deny the requests of BellSouth and Ameritech. They assert that Type 2A interconnection for RCCs is reasonable, and should be available to paging carriers because, in most cases, Type 2A is a less costly and more efficient form of interconnection than Type 1. CyberTel disputes BellSouth's contentions that a change in the paging carrier's traffic patterns would result in overall network inefficiency, adding that a paging call is no more burdensome to the network if it is switched from an end office to a tandem than if it is switched from one end office to another end office. According to Telocator/Paging, BellSouth "seeks to relegate paging carriers to a lower priority of entitlement in securing essential interconnections to the telephone network." Telocator/Paging Response at 4-5. Lastly, Telocator/Paging opposes Ameritech's request that the Commission not apply its six-month policy to negotiations involving Type 2 interconnection for paging services. It argues that exceptions to our six-month policy would "allow the Bell Operating Companies to thwart their competitors' development of services by delaying negotiations for reasonably requested paging interconnection." Telocator/Paging Reply at 1-2.

47. We deny BellSouth's and Ameritech's requests to reconsider or clarify the application of our Type 2 reasonable interconnection and six-month policies to RCCs. First, we agree with the RCC oppositions that paging carriers' requests for Type 2A interconnection are not inherently unreasonable, contrary to the assertions of BellSouth. Moreover, we emphasize that, like a cellular system, a paging carrier is entitled to choose the most efficient form of interconnection for its network, and the BOCs may not dictate an RCC's type of interconnection. Finally, we are not persuaded by Ameritech's arguments that certain landline companies should be exempt from our six-month timeframe to provide Type 2 interconnection to an RCC selecting this form. By analogy to our position that six months is the maximum length of time for the provision of Type 2 interconnection to cellular carriers, we note that landline companies should need no more than six months to provide Type 2 to paging carriers. No evidence has been placed in the record to suggest that this is not a reasonable policy.

ORDERING CLAUSES

48. WHEREFORE, for the foregoing reasons, IT IS ORDERED that the Declaratory Ruling, In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, IS AFFIRMED IN ALL RESPECTS, and IS CLARIFIED TO THE EXTENT INDICATED HEREIN.

49. IT IS FURTHER ORDERED that the Petition for Partial Reconsideration, filed by the Texas Non-wireline Carriers Serving Dallas, Houston, Austin, San Antonio, and El Paso, IS DENIED.

50. IT IS FURTHER ORDERED that the Petition for Partial Reconsideration, filed by New York Telephone Company and New England Telephone and Telegraph Company, IS DENIED.

51. IT IS FURTHER ORDERED that the Petition for Clarification, filed by Southwestern Bell Telephone Company, IS GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED IN ALL OTHER RESPECTS.

52. IT IS FURTHER ORDERED that the Petition for Clarification, or in the alternative, Reconsideration, filed by BellSouth Corporation, IS GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED IN ALL OTHER RESPECTS.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] TNC and NYNEX each filed a Petition for Partial Reconsideration. BellSouth filed a Petition for Clarification, or in the Alternative, Reconsideration, and SWB filed a Petition for Clarification. The responsive pleadings are entitled Opposition to Petitions for Reconsideration or Clarification, Statement in Response to Petitions, Comments, Opposition to Responses, Reply to Oppositions and Reply. In the interest of clarity, we will refer to the initial pleadings of TNC, NYNEX, BellSouth and SWB as petitions and to the various responsive pleadings as oppositions or replies.

[2] An NXX code consists of the first three numbers of a typical seven-digit telephone number. Each NXX code includes a block of 10,000 telephone numbers. The code's function is to instruct switches to communicate with other switches in the processing of a call.

[3] TNC and Ameritech request that, if the Commission decides not to assert plenary jurisdiction over all NXX code charges in this proceeding, this issue should be resolved in another Commission proceeding involving a formal complaint by Contel Cellular of El Paso (Contel) against SWB. This request is now moot because the Common Carrier Bureau's Enforcement Division dismissed the Contel complaint. *Contel Cellular of El Paso, Inc. v. Southwestern Bell Telephone Company, Order*, 3 FCC Rcd 184 (1988) (*Contel*), *aff'd, Amended Order*, 3 FCC Rcd 426 (1988). In that proceeding, Contel alleged that SWB's attempt to impose recurring charges for an NXX code assignment to Contel violated the Communications Act. After the close of the pleading cycle, the parties entered into negotiations, and subsequently advised the Commission that they had resolved to their mutual satisfaction matters pertaining to charges for the assignment of NXX codes in that case.

[4] Part 67 of the Rules has been replaced by Part 36.

[5] *See Louisiana Public Service Commission v. FCC*, 106 S.Ct. 1890, 1902 n. 4 (1986); *California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977); *North Carolina Utilities Commission v. FCC*, 537 F. 2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976).

[6] *See Detariffing the Installation and Maintenance of Inside Wiring, Memorandum Opinion and Order*, 1 FCC Rcd 1190 (1986); *Detariffing of Billing and Collection Services, Report and Order*, 102 FCC 2d 1150 (1986).

[7] SWB does not dispute our assertion of full jurisdiction over the allocation of NXX codes.

[8] Landline telephone company costs initially are recorded in accordance with the Uniform System of Accounts (USOA) or a similar accounting system. The costs recorded in these accounts are then separated into intrastate and interstate costs pursuant to the Part 36 separations process. The separations procedures set forth in this part are designed primarily for the allocation of property costs, revenues, expenses, taxes and reserves between state and interstate jurisdictions. As SWB acknowledges in its pleading, NXX code assignment costs may not be individually identified, but are allocated between jurisdictions, and recorded pursuant to the USOA. (SWB Opposition at 4.)

[9] We are confident that good faith negotiations can resolve the controversies of this issue. However, if inordinate industry and Commission resources are needed to address the problem, we may examine the possibility of revising our USOA and separations procedures to identify and allocate these NXX code costs.

[10] *Cellular Communications Systems, Report and Order*, 86 FCC 2d 469, 496 (1981); *Memorandum Opinion and Order on Reconsideration*, 89 FCC 2d 58, 82 (1982).

[11] The Commission included its *Policy Statement on Interconnection of Cellular Systems (Policy Statement)* in Appendix B of the *Interconnection Order, supra* at 1283-1285.

[12] SWB also requests clarification that the good faith negotiation policy applies not only to landline carriers, but also to cellular operators. According to SWB, in negotiations, cellular carriers at times argue that the state regulatory commissions do not have jurisdiction over any cellular interconnection issues. In light of the *Ruling's* recognition of dual jurisdiction over many cellular interconnection matters, SWB contends, this cellular carrier argument may constitute bad faith negotiation. We decline to make SWB's requested clarification because "negotiation" implies that both parties have a mutual obligation to conduct their discussions in good faith.

[13] On several occasions, upon request from the negotiating parties, staff members of the Common Carrier Bureau's Enforcement Division and Mobile Services Division have conducted informal meetings with representatives of the telephone and cellular industries to assist them in reaching interconnection agreements. We encourage landline companies and cellular carriers alike to take advantage of this informal process prior to the filing of complaints.

[14] Under Section 208 of the Act, a complaint may be filed against a common carrier for an alleged violation of the Act.

[15] *See Indianapolis, infra*.

[16] Type 1 service involves interconnection to a telephone company end office similar to that provided to a private branch exchange (PBX). Under Type 1 interconnection, the telephone company owns the switch serving the cellular network and, therefore, performs the origination and termination of both incoming and outgoing calls. Under Type 2, the cellular carrier owns the switch, enabling it to originate outgoing calls and to terminate incoming calls. There are two forms of Type 2 interconnection, Type 2A and Type 2B. Type 2A service is interconnection to a local telephone company tandem similar to that used by an end office. Type 2B involves interconnection at an end office to a high usage inter-office trunk. Both Types 2A and 2B interconnection are referred to as end office interconnection.

[17] Ameritech filed a reply which supported the petitions filed by NYNEX and BellSouth.

[18] In its Petition, NYNEX asserts that the mutual compensation principle appears contrary to our holding in *Indianapolis*. NYNEX Petition at 9, n. 18. But the NYNEX Reply asserts that our *Ruling and Indianapolis* are consistent. NYNEX Reply at 6. Apparently, as discussed *infra*, NYNEX objects to the mutual compensation policy as applicable to interstate rates that NYNEX claims it does not charge.

[19] *Ruling*, at para. 44.

[20] *Cellular Communications Systems, supra*, 86 FCC 2d at 496.

[21] For a description of Type 1, Type 2, and Types 2A and 2B interconnection, *see* footnote 16, *supra*.

[22] *Cellular Communications Systems, supra*, 86 FCC 2d at 496; *Policy Statement, supra*, at para. 3.

[23] SWB Petition at 6-7.

[24] SWB notes that, even if the Commission grants its request for clarification in this regard, it will attempt to provide Type 2B interconnection within six months.

[25] *Cellular Communications Systems, supra*, 86 FCC 2d at 496.

[26] Specifically, BellSouth requests clarification of footnote 60 of the *Ruling*, which stated that "our policies may apply differently depending on the exact form of interconnection." BellSouth has taken this footnote out of context. Footnote 60 relates to the *Ruling's* discussion of switching costs and mutual compensation, not to the issues of system design and reasonable interconnection.

[27] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CLYDE W. PIERCE File No. 94206-CL-P-241-A-86

For a construction permit to
establish a new cellular system to
operate on frequency Block A in the
Domestic Public Cellular Radio
Telecommunications Service to serve
the Pueblo, Colorado MSA

MEMORANDUM OPINION AND ORDER

Adopted: February 17, 1989; Released: March 15, 1989

By the Commission:

1. Clyde W. Pierce (Pierce) has filed an application for review of a denial by the Common Carrier Bureau (Bureau) of Pierce's petition for reconsideration of the Mobile Services Division (MSD) decision dismissing Pierce's application as defective. Corinthians Cellular Associates (CCA) has filed an opposition to the application for review.[1] The Bureau, in denying reconsideration found that the application violated Section 1.743 of the Commission's rules because it was signed by someone other than the applicant and did not meet the exceptions contained in the rules.[2] *See* Order on Reconsideration, 2 FCC Rcd 3522 (1987).

2. Pierce contends the Bureau erred by failing to recognize the applicability of the common law of agency to the present case. Thus, Pierce maintains his application was wrongly dismissed.[3]

3. According to Pierce, the practice of authorizing another to act on one's behalf is established in American common law. The document which spells out the extent of the agent's authority, Pierce states, is a contract which creates a principal-agent relationship giving the agent the authority to bind the principal with the principal retaining the ultimate responsibility for the agent's actions. Pierce argues that this well-settled law should be recognized by the Commission for purposes of the cellular application process. This is especially true, Pierce contends, given the ambiguities of Section 1.743 of the Commission's rules. Pierce claims that the provisions of Section 1.743(b) appear to apply only when an applicant's legal counsel signs an application, because it does not refer to "attorneys-in-fact" or to persons authorized to act pursuant to a power of attorney. Pierce maintains that even if Section 1.743(b) would not permit another to sign in an applicant's place, such an action would be permissible under Section 1.743(a). Although Section 1.743(a) states that an application must be "personally signed by the applicant, if the applicant is an individual," Pierce argues that the effect of a power of attorney is to place the agent "in the shoes" of the principal. Thus, Pierce argues that his use of a power of attorney satisfies the requirements of Section 1.743(a).

4. Pierce recognizes that the certification and verification of cellular applications for markets below the top 120 had a special purpose, but asserts that there is no conflict between the purposes for which the certification was created and the use of a power of attorney. According to Pierce, certification of his application by a power of attorney in no way affected Pierce's responsibility to ensure that his application met Commission standards nor the Commission's ability to rely upon the accuracy of the information contained in the application. In affirming the MSD's action returning Pierce's application for violation of Section 1.743, Pierce states, the Bureau did not apply the relevant principles of law and failed to address Pierce's arguments except to simply state them. Therefore, Pierce claims that the Bureau did not provide adequate justification for the MSD's action.

5. In addition, Pierce argues that the cases he cited to show that the alleged defect was curable by amendment were not given any weight by the Bureau in its order. Pierce contends that the Bureau failed to explain why his case is not as "extraordinary" as *Johnston Broadcasting Co.*, 175 F.2d 355 (D.C. Cir. 1949) and *Jane A. Roberts*, 29 FCC 141 (1960) in which the Commission accepted *nunc pro tunc* amendments. Pierce challenges the Bureau's reliance on *Robert J. Burke*, Mimeo No. 3812, released April 15, 1986, as an example of a case in which extraordinary circumstances were also lacking. In that case, an application was returned for failure to comply with Section 22.913 of the Commission's rules regarding original, rather than photocopied signatures. Pierce sees as a distinguishing fact that the applicant in *Burke* did not offer an explanation for its failure to comply with the rules nor did it attempt to rectify the defect. Thus, Pierce maintains, his application presents far more compelling circumstances warranting relief than those found in *Burke*.

6. Finally, Pierce argues that those cases cited by the Bureau as having been granted inadvertently although signed by an authorized agent pursuant to a valid power of attorney further justify grant of Pierce's application. Pierce states that the inadvertant grant of the application for the non-wireline cellular system in Fayetteville, North Carolina was just three weeks old when the MSD returned Pierce's application. Therefore, Pierce argues that at the time the MSD returned Pierce's application for use of a power of attorney, it permitted a construction authorization granted to an identically situated applicant to become final. Pierce concludes that his application was treated unfairly.

7. In its opposition, CCA complains that Pierce's application for review essentially reiterates arguments made in his petition for reconsideration. Specifically, CCA states that Pierce's arguments that Section 1.743(b) refers to attorneys-at-law and not attorneys-in-fact is not relevant here. Neither, CCA claims, are common law notions of agency needed to interpret Section 1.743(a) because the Commission's administrative interests are different from those governing the making of contracts. CCA dismisses Pierce's suggestion that the MSD deliberately allowed a defective application to become final while dismissing Pierce's application and notes that neither Mr. Pierce nor his consultant claims that they relied to their detriment on the Commission's grant of that defective application.[4]

DISCUSSION

8. Section 1.743(a) provides in part that applications, amendments and related statements of fact required by the Commission "shall be *personally signed* by the applicant, if the applicant is an individual; by one of the partners, if the applicant is a partnership; by an officer or duly authorized employee, if the applicant is a corporation. . . ." (emphasis added). Section 1.743(b) provides that an applicant's attorney may sign the required documents "in case of the applicant's physical disability, or in case the applicant does not reside in any of the contiguous 48 states of the United States or in the District of Columbia."[5] If the exception is used, the attorney must explain why he is signing the application.

9. In the case at hand, Pierce's application was not *personally signed* as required by Section 1.743(a). Rather, it was executed pursuant to a power of attorney and merely stated that the applicant was unavailable to sign the document. This substitute signature clearly does not fall under the permitted exception stated in Section 1.743(b). The application did not include an explanation as to why Pierce did not personally sign the application nor did it state that Pierce was disabled or did not reside in the United States. Moreover, Pierce's argument that agency law should govern this case is flawed. Such a general rule of law is neither applicable nor governing with respect to specific Commission rules of practice and procedure. Indeed, it is well settled that rules, regulations and orders of administrative agencies carry the full force of federal law and are accorded the same overriding effect over common law as federal statutes. *See Fidelity Federal Savings and Loan v. de LaCuesta*, 458 U.S. 141, 153 (1982); *New England Tel. & Tel. Co. v. Public Utilities Com'n of Maine*, 570 F. Supp. 1558, 1571 (D.C. Me. 1983); *Batterton v. Francis*, 432 U.S. 416, 97 S. Ct. 2399, 2405 (1977). Furthermore, we are not persuaded that Pierce's reliance on his consultant is a mitigating factor. Parties are charged with knowledge of and are bound by statutes and regulations despite reliance to their detriment upon incorrect information received from third parties. *Cf. Rosner v. Secretary of Health, Ed. and Welfare*, 306 F. Supp. 853, 855 (S.D. Fla. 1970).[6]

10. The cases Pierce cites to show that the Commission has accepted amendments to cure signature defects did not contain certification requirements of the type required in cellular applications, nor were they subject to a letter perfect standard, *Johnstown Cellular Communications*, 1 FCC Rcd 1164 (Com. Car. Bur. 1986), distinguishing them from the case before us. In addition, the Commission stated clearly that the applicants in the cited cases had violated the rules. In *Jane A. Roberts, supra*, the Commission held that an application signed by someone under color of a power of attorney did not comply with the rules. The Commission found, however, that the application was not void and could be amended *nunc pro tunc* to correct the defect if the equities support allowing such an amendment. The Commission found that the signature of the applicant's name by her husband was not done with intent to violate the Commission's rules. Moreover, the applicant held other FCC licenses, was deemed qualified to be a licensee, a hearing had been held and the construction of station facilities had been completed. In *Johnston Broadcasting, supra*, the court similarly held that the absence of verification could be cured by amendment (the application had been pending although in a defective state). However, nothing in this decision mandates the acceptance of such amendments. In this instance, under our letter perfect standard such amendments are not accepted. Moreover, we do not find that the case at hand presents such circumstances that would warrant us granting a waiver of that rule. *See Bruce M. Schorsten*, 3 FCC Rcd 4409 (1988); *Ronald F. Trinchitella*, 3 FCC Rcd 343 (Com. Car. Bur. 1987), *appl. for rev. pending*.

11. Finally, the Bureau's inadvertent grant of the Fayetteville application does not justify grant of Pierce's application. As we have stated previously, the Commission has never permitted a cellular application to remain on file with a faulty signature once we have been made aware of that fact. *See American Cellular Network Corporation of Nevada*, 2 FCC Rcd 4530, 4531 n. 2 (1987). In the Fayetteville case no signature issue was raised in any pleading nor did the staff discover the error on its own. Had the lack of appropriate signature been brought to our attention, or had we discovered the error, we would have enforced the requirements of Section 1.743 of the rules and dismissed the improperly signed application. Section 1.108 of the rules generally bars the reversal of a grant more than 30 days after the grant date. *Cf. Greater Boston Television Corporation* v. *FCC*, 463 F. 2d 268 (D.C. Cir. 1971). Moreover, since the Fayetteville grant occurred well after Pierce filed his application, Pierce obviously did not place any reliance on this action. "The Commission cannot ignore the requirements of Section 1.743 of the rules in this case simply because it has inadvertently granted construction permits absent the appropriate signatures in the past." *Id.*

12. Accordingly, IT IS ORDERED, that the Application for Review filed by Clyde W. Pierce, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] CCA is the second-ranked applicant in the lottery for the Pueblo, Colorado nonwireline cellular market.

[2] Pierce's application was first ranked in the lottery for the Pueblo, Colorado Metropolitan Statistical Area. By letter dated January 14, 1987, the MSD dismissed the application because it was signed, certified and verified by Pierce's consultant, Mr. Robert Napp (Napp) authorized to act on Pierce's behalf by a power of attorney.

[3] In the application for review Pierce alleges he relied on Napp's expertise for preparing his application and agreed to Napp's suggestion that Pierce execute a power of attorney authorizing Napp to sign the application while Pierce was travelling and difficult to reach.

[4] CCA notes that the application for Fayetteville was not granted until December 1986, well after the May 1986 filing of Mr. Pierce's application.

[5] Recently this rule was amended to bring Section 1.743(b) into conformity with Sections 73.3513(b) and 1.913(b) of the rules which govern the signing of broadcast and private radio applications, respectively. Specifically, Section 1.743(b) was amended to permit attorneys to sign applications if the applicant is absent from the United States. Previously the attorney could

sign only if the applicant did not reside in the contiguous 48 states. The outcome of our decision would not have been different had the amended rule been in effect at the time Pierce's application was filed. *See* Revision of Section 1.743 of the Commission's Rules and Regulations, 3 FCC Rcd 2443 (1988).

[6] Pierce supplemented his reply to CCA's opposition to bring to the Commission's attention a decision by the Chief of the Mobile Services Division in *Contel Cellular, Inc.*, 2 FCC Rcd 4773 (Mob. Svc. Div. 1987). There, the MSD accepted the signature of the attorney for Continental Telephone Company of Vermont (Continental is an affiliate of Contel) on the verification page of Contel's application although the petitioner claimed that this signature violated Section 1.743 of the Commission's rules. The verification page of Contel's application was signed by Continental's attorney as the "authorized representative" of the applicant. Pierce claims that the circumstances surrounding that case are not different from those of his case and that likewise, his application deserves to be accepted. Pierce's reliance on *Contel* is misplaced. Both the certification and Form 401 of Contel's application were signed by the Vice-President of Continental. This is precisely what Section 22.913(b)(3) requires. The rule is silent as to exactly who is to sign the verification. Therefore, we accepted the attorney's signature as verification that the certification and the matters contained therein were true and correct.

[7] On remand, the Commission interpreted the court's opinion as holding "that before an application can be granted by the Commission, it must be properly verified, but that generally, *where the rules of the controlling agency so permit*, and where such amendment would be consistent with the equities of the particular factual circumstances involved, any such defect in verification can be cured by a *nunc pro tunc* amendment." *Johnston Broadcasting*, 14 FCC 472, 474 (1950) (emphasis added). In light of the facts of the case, the Commission accepted the amendment. Here, our letter perfect standard does not permit such amendments.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic	Transmittal Nos. 224
Telephone Companies	and 226

Revisions to Tariff F.C.C. No. 1

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 1989; Released: March 16, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 8, 1988, the Common Carrier Bureau released an Order rejecting Bell Atlantic Telephone Companies (Bell Atlantic) Transmittal Nos. 224 and 226.[1] This Bureau concluded that the individual case basis (ICB) rates for DS3 service in that transmittal were unreasonably discriminatory, and that the cost support filed with the transmittals was deficient. We also expressed concern that the continued use of ICB rates for DS3 service may no longer be justified. Moreover, that Order stated that continued use of ICB rates for DS3 service must be supported by a more compelling justification than Bell Atlantic provided for Transmittals 224 and 226.[2]

2. On March 28, 1988, this Bureau released an Order initiating an investigation of a number of ICB rates in local exchange carrier (LEC) tariffs, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 services, and establishing a pleading cycle. [3] Since that time, ICB filings have become effective subject to the outcome of the investigation initiated in CC Docket No. 88-136.[4]

3. On April 8, 1988, Bell Atlantic filed a petition for reconsideration of the *March 8 Order*.[5] Local Area Telecommunications, Inc. (Locate) filed an opposition to Bell Atlantic's petition on April 21, 1988.[6] On April 22, 1988, Institutional Communications Company (ICC) filed its opposition.[7]

II. SUMMARY OF PLEADINGS

A. *Bell Atlantic Petition for Reconsideration*

4. Bell Atlantic first contends that its pricing of DS3 services complies with the requirements of Section 202(a) of the Communications Act because there is no discrimination in its proposed rates, "after accounting for differences in services, costs, and payment arrangements." Bell Atlantic Petition at 1-2. Specifically, Bell Atlantic asserts, when the four cases this Bureau used in our *March 8 Order* are examined in context, they reveal that Bell Atlantic's ICB pricing is fair and non-discriminatory. *Id.* at 5.

5. Bell Atlantic next argues that our rejection of its cost support material was arbitrary and capricious. *Id.* According to Bell Atlantic, the cost support information supplied with Transmittals 224 and 226 was similar to the data supplied by Bell Atlantic for all prior ICB filings (which were accepted by this Bureau). *Id.* at 6. Further, Bell Atlantic maintains that this Bureau has permitted DS3 rates for other carriers to take effect based on "considerably less" cost support information than that found unacceptable for Bell Atlantic. *Id.* at 6. Bell Atlantic asserts that the application of more stringent cost support standards to Bell Atlantic's DS3 offerings than to those of other exchange carriers "is also arbitrary and capricious." *Id.* at 7.

B. *Locate Opposition*

6. Locate submits that Bell Atlantic has failed to prove that Transmittals 224 and 226 are not unreasonably discriminatory. Locate Opposition at 5. Locate maintains that even if the inconsistencies in the four cases used in the *March 8 Order* are justified, Bell Atlantic's petition does not address the remaining ICBs in Transmittals 224 and 226. Moreover, Locate asserts, Bell Atlantic does not establish that the differences between the ICBs, all of which pertain to the same service, are justified. *Id.* Locate further argues that Bell Atlantic's petition is improper because Bell Atlantic violated Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, by basing its petition on information known to Bell Atlantic at the time it submitted the transmittal. *Id.*

7. Locate also submits that Bell Atlantic's petition does not address the wide variations in non-recurring charges noted in the *March 8 Order*. *Id.* at 6. According to Locate, this failure to provide required information stands in direct contrast to Bell Atlantic's argument that the Bureau's rejection of its cost support material was arbitrary and capricious. *Id.*

8. Locate next argues that the Bureau correctly rejected the transmittals for failure to comply with Sections 1.363 and 61.38 of the Commission's Rules, 47 C.F.R. §§ 1.363, 61.38. *Id.* at 6. According to Locate, the fact that previous Bell Atlantic cost support filings and the filings of other carriers were accepted by the Bureau "has no bearing on the sufficiency of subsequent filings." *Id.* at 7. Moreover, Locate contends, since the Bureau's decision not to suspend or reject prior filings does not constitute a determination of the lawfulness of the tariff, the Bureau's "acceptance" of Bell Atlantic's previous filings does not mean that these filings were lawful or that the instant filings are lawful. *Id.* at 8.

C. *Bell Atlantic Reply and Motion To Strike*

9. On May 3, 1988, Bell Atlantic filed a reply to Locate's opposition. Bell Atlantic submits that Locate fails to explain why the DS1 equivalency analysis in Bell Atlantic's petition is insufficient, when it was on this basis that the Bureau determined that the rates were discriminatory.[8] Bell Atlantic Reply at 3. Further, Bell Atlantic argues, there is no basis for Locate's claim that Bell Atlantic should have addressed all the DS3 services in Transmittals 224 and 226, since Locate has not cited a single instance of alleged discrimination among any of the other DS3 cases.

10. In fact, Bell Atlantic states, all of the other DS3 prices in Transmittals 224 and 226 were set on the basis of the same factors used in setting the 14 different DS3 rates discussed in the petition. *Id.* Bell Atlantic submits that its petition appropriately addresses the four examples chosen by the Bureau to prove its claim of discrimination. *Id.* Bell Atlantic further contends that the Bureau acted arbitrarily by "departing, without adequate explanation, from its prior procedure, and by treating similarly situated parties differently." *Id.* at 4. According to Bell Atlantic, the Commission has recently been reversed by the Court of Appeals on such grounds.[9]

III. DISCUSSION

11. We are not persuaded that our rejection of Bell Atlantic's ICB filings was in error. In essence, Bell Atlantic has not presented any arguments that it has not presented before. Bell Atlantic had three opportunities prior to the scheduled effective date of the referenced transmittals to explain the basis of its ratemaking. That explanation could have been provided in its Description and Justification (D&J) supporting the captioned transmittal or its opposition to Locate's petition to reject. This Bureau also posed specific questions concerning Bell Atlanic's ICB ratemaking method. Bell Atlantic could have provided additional information at that time. Based on the information submitted, we concluded that Bell Atlantic had not demonstrated that the obvious disparities in the rates charged various customers were justified.

12. Although Bell Atlantic seeks to demonstrate in its petition for reconsideration that the rates charged in the four cases cited in the *March 8 Order* were not unreasonably discriminatory, this can only be described as too little too late. It was incumbent upon Bell Atlantic to justify the proposed rates -- all of the proposed rates -- in the cost support material that accompanied the tariff. Bell Atlantic failed to do this. We do not mean to underestimate the difficulty of the task of justifying as reasonable unexplainedly disparate rates for apparently like services. It would certainly be easier to demonstrate that an averaged rate structure is lawful. However, Bell Atlantic did not elect to file averaged rates for DS3 service until it made its annual 1989 access tariff filing.

13. In addition, Bell Atlantic asserts that its rates are non-discriminatory because similarly situated customers pay equivalent rates. Bell Atlantic Petition at 5. If this is so, then it should have been possible for Bell Atlantic to demonstrate in its Description and Justification that its ICB rates are computed in conformance with some uniform methodology. Moreover, if this were the case, then it would seem that the rationale for using ICB rates -- that it is impossible to develop an averaged schedule of rates for DS3 service due to the unique characteristics both of the service and of the market -- must fall. In other words, if Bell Atlantic had, in any event, developed a uniform methodology for setting non-discriminatory ICB rates, that methodology should have been sufficient basis for a generalized tariff offering.[10]

14. Finally, Bell Atlantic's assertion that our rejection of Bell Atlantic's cost support material was arbitrary and capricious is unpersuasive. Bell Atlantic does not deny that it submitted deficient cost support material. Rather, Bell Atlantic compares the cost support material underlying these transmittals to cost support submitted by it and by other LECs and finds it "very similar."[11] Bell Atlantic has not demonstrated that past decisions to accept cost support that may have been deficient caused Bell Atlantic to fail to develop cost support that could have been developed. Bell Atlantic has had an adequate opportunity to supplement the cost support that it submitted with the initial transmittal. Its failure to justify its disparate rates for DS3 services demonstrates that these disparate rates cannot be justified.

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that the petition for reconsideration filed by the Bell Atlantic Telephone Companies IS DENIED.

16. IT IS FURTHER ORDERED that the motion to strike filed by the Bell Atlantic Telephone Companies IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Bell Atlantic Telephone Companies, 3 FCC Rcd 1621 (1988) (*March 8 Order*).

[2] *Id.* at 1622.

[3] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (1988). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (1988); Public Notice, Network Communications, Inc., Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, DA 89-2, released Jan. 27, 1989.

[4] *See, e.g.*, Order, CC Docket No. 88-136, DA 89-81, released Jan. 30, 1989.

[5] Bell Atlantic Petition for Reconsideration, filed Apr. 8, 1988 (Bell Atlantic Petition).

[6] Locate Opposition to Bell Atlantic Petition for Reconsideration, filed Apr. 21, 1988 (Locate Opposition).

[7] ICC Opposition to Petition for Reconsideration, filed Apr. 21, 1988 (ICC Opposition). On May 4, 1988, Bell Atlantic filed a reply to Locate's opposition and a motion to strike ICC's opposition on the ground that it was filed out of time. ICC then filed an opposition to Bell Atlantic's reply and motion on May 5, 1988. On May 13, 1988, Bell Atlantic filed a letter in response to ICC's opposition to Bell Atlantic's motion to strike. ICC's opposition to the petition was untimely and was not accompanied by a motion to accept its late-filed pleading. We therefore grant Bell Atlantic's motion.

[8] Regarding Locate's argument that Bell Atlantic's petition is improperly based on information known at the time the transmittals were filed (thus contravening Section 1.106), Bell Atlantic contends that the data in its petition specifically respond to this Bureau's analysis of DS3 pricing which was not known by Bell Atlantic prior to release of the *March 8 Order*. Bell Atlantic Reply at 2 n.3. Moreover, Bell Atlantic maintains, even if Locate were correct that this information could have been presented previously Section 1.106(c)(2) allows consideration of previously

known information if it is in the public interest to do so. According to Bell Atlantic, the public interest is served by acceptance of Bell Atlantic's data, since that data clarifies and corrects errors in this Bureau's underlying decision. *Id.*

[9] *Id.* at 4 (citing Communications Satellite Corporation v. FCC, No. 86-1669, slip op. at pp. 12-14, 19 (D.C. Cir., Jan. 12, 1988)).

[10] We believe the fact that Bell Atlantic has filed a generalized DS3 rate structure in its annual 1989 access tariff filing further demonstrates that this was not an impossible task.

[11] Bell Atlantic Petition at 5.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RAM MOBILE COMMUNICATIONS OF COLORADO, INC. File No. 22066-CD-P/ML-01-86

For authority to construct and operate an additional facility of Station KUC881 on frequency 158.10 MHz in the Public Land Mobile Service at Aurora, Colorado

STRASBURG TELEPHONE COMPANY File No. 23490-CD-P/ML-01-86

For authority to construct and operate an additional facility of Station WXS399 on frequency 158.10 MHz in the Public Land Mobile Service at Bennett, Colorado

MEMORANDUM OPINION AND ORDER

Adopted March 9, 1989; Released: March 16, 1989

By the Acting Chief, Mobile Services Division:

1. RAM Mobile Communications of Colorado, Inc. (RAM) and Strasburg Telephone Company (Strasburg) filed the captioned, mutually exclusive applications to construct and operate additional facilities on frequency 158.10 MHz in the Public Land Mobile Service. Each applicant filed a petition against the other's application and responsive pleadings were filed. RAM also filed an amendment to its application. In a lottery held on April 24, 1987, RAM's application was selected first. *See* Public Notice, PMS-24-3, Mimeo No. 3009 (released April 29, 1987).

PETITION TO DISMISS RAM'S APPLICATION

2. Strasburg states that RAM's application should be dismissed because RAM's interference study is incomplete and because RAM's proposed facility would cause interference to Strasburg's existing co-channel facility, Station WXS399, at Strasburg, Colorado. Strasburg argues that RAM's interference study fails to fully comply with Section 22.15(b)(2) of the Commission's rules because the study only shows non-interference along the interstation radial between RAM's proposed site and Strasburg's existing station, and does not address the possibility of interference along other radials. Strasburg argues that given the short distance[1] between the two locations, and RAM's plan to use a highly directionalized antenna, RAM should have evaluated interference along other radial bearings. Strasburg also asserts that RAM's proposed facility would cause interference along the 50^0 to 80^0 radials between the two sites.

3. In response, RAM argues that Section 22.15(b)(2) of the rules does not require applicants to submit information regarding other radials, and that its interference study is therefore complete. RAM also submits an engineering report showing an eight radial analysis, supplemented by additional radials every 5^0 between 40^0 and 90^0. The report concludes that RAM's proposed facility will not cause harmful interference to Strasburg's facility. Finally, RAM submits an amendment reducing the effective radiated power (e.r.p.) of its proposal by 0.5 decibels. RAM states that it wishes to avoid delay and that this slight reduction in e.r.p. should resolve any possible concern about interference.

4. In reply, Strasburg states that applicants must provide information on other radials when such information is necessary to demonstrate interference free operation. Strasburg further states that there are engineering errors in RAM's amendment and that the interference problem remains unresolved.

DISCUSSION

5. Section 22.15(b)(2)(i) of the rules states that "[t]he application shall contain interference studies demonstrating that the proposed facilities will not cause harmful electrical interference to . . .co-channel facilities" within a certain distance. Sections 22.15(b)(2)(ii)-(iii) of the rules list specific information to be included in the interference studies. These sections require the applicant to submit information concerning the interstation radial, but do not require information regarding other radials.

6. However, a highly directionalized facility can cause interference along other radials even though there is a showing of interference free operation along the interstation radial. *Page - U, Inc.*, 2 FCC Rcd 6748 (Mob. Serv. Div. 1987). In such cases, applicants may be required to show non-interference along additional radials before the application will be granted. *Id.* at 6748. *See also* Sections 22.15(b)(2)(i) & 22.100(a).

7. In the present case, Strasburg argues that RAM's proposed facility will cause interference to Strasburg's co-channel facility along the radials between 50^0 and 80^0. The Mobile Services Division (MSD) performed an interference analysis and found no interference to Strasburg's co-channel station.[2] Furthermore, RAM submitted an eight radial analysis, supplemented by additional radials every 5^0 between 40^0 and 90^0, which also showed no interference. Finally, Strasburg has not submitted sufficient evidence to substantiate its claim of interference.[3] Based on the MSD's interference analysis, RAM's radial by radial analysis, the 0.5 decibel reduction in e.r.p. and Strasburg's failure to substantiate its claim of interference we are denying Strasburg's petition to dismiss and granting RAM's application.

8. Based on RAM's selection in the lottery, and our determination that RAM is qualified to be a Commission licensee, Strasburg's captioned application is dismissed without prejudice and RAM's petition to dismiss Strasburg's application is dismissed as moot.

ORDERING PARAGRAPHS

9. Accordingly, IT IS ORDERED that the application of RAM Mobile Communications of Colorado, Inc., File No. 22066-CD-P/ML-01-86, IS GRANTED.

10. IT IS FURTHER ORDERED that the petition to dismiss filed by Strasburg Telephone Company IS DENIED.

11. IT IS FURTHER ORDERED that the application of Strasburg Telephone Company, File No. 23490-CD-P/ML-01-86 IS DISMISSED WITHOUT PREJUDICE.

12. IT IS FURTHER ORDERED that the petition to deny filed by RAM Mobile Communications of Colorado, Inc. IS DISMISSED AS MOOT.

13. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Acting Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Strasburg states that this distance is approximately 21 miles.

[2] The MSD's interference study was based on the figures in RAM's amended application, thus incorporating RAM's 0.5 dB reduction in e.r.p.

[3] Strasburg did submit a contour map purportedly showing interference, but failed to include the data on which the map was based. Strasburg also states that there are engineering errors in RAM's amendment, but fails to identify specifically the errors to which it refers.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

PEPPER SCHULTZ	**MM Docket No. 83-1206**
Sparks, Nevada	File No. BPH-820519AK
COMSTOCK BROADCASTERS, INC.	**MM Docket No. 83-1207**
Sparks, Nevada	File No. BPH-820628AQ

For Construction Permit
for a New FM Station

Appearances

Herbert D. Miller, Jr., Esq., on behalf of Pepper Schultz (Schultz); *David M. Hunsaker, Esq.*, on behalf of Comstock Broadcasters, Inc. (Comstock); and *Norman Goldstein, Esq.*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

FURTHER SUPPLEMENTAL INITIAL DECISION OF DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE JAMES F. TIERNEY

Issued: March 6, 1989; Released: March 16, 1989

PRELIMINARY STATEMENT

1. By *Memorandum Opinion and Order*, FCC 88-85, released March 11, 1988, the Commission remanded the instant case to the Presiding Judge for further evidentiary hearing on the staffing and financial issues added against Schultz by the Review Board. In so remanding, the Commission noted:

> The pleadings before us raise substantial and material questions of fact which relate to Schultz's qualifications to be licensee and, therefore, should be explored at an evidentiary hearing. First, we are troubled by the seeming discrepancy between Schultz's evidentiary showing, now before us, and the present record. For example, the Board in its remand order found that Schultz had not previously referred to using volunteers to run the station. 58 RR 2d at 437. Moreover, the [Judge's] findings in the supplemental initial decision seem to support Comstock's allegation that the proposal set forth in Schultz's submission is not his original plan, but one first formulated in an amendment rejected by the Board. *Pepper Schultz*, 103 FCC 2d at 1067-68. The present record provides no basis on which to resolve this dispute. Accordingly, a further hearing is necessary to decide this substantial and material question of fact. We also find a substantial and material question of fact as to whether the virtual one-man operation of Schultz's proposed commercial FM radio station can be effected. We therefore remand this proceeding for further hearings.

(*Remand Order*, Section 8, 64 RR 2d at 1133).

2. Additionally, the Commission noted that discrepancies existed between the showings submitted by Schultz to the Commission and previous statements made by him in response to Comstock's Motion for Enlargement of Issues. The Commission noted further that Comstock had objected to some of the items shown on Schultz's balance sheet as being inconsistent with his prior deposition testimony. The Commission remanded the financial issue as well for further hearing.

3. In response to the Commission's *Remand Order*, a further conference was convened on March 22, 1988, and directed that the parties submit further showings addressing the concerns of the Commission (Tr. 264-265). In response Schultz submitted a "Submission in Response to Remand Order" on April 12, 1988, and Comstock responded thereafter with its "Response and Opposition to Schultz Remand Submission" on April 22, 1988.

4. By *Memorandum Opinion and Order* released May 4, 1988, (FCC 88M-1334), the Presiding Judge directed that Comstock may have further discovery in the form of written or oral cross-examination on Schultz's Remand Submission. Pursuant to that *Order*, Comstock noticed Schultz for oral deposition and conducted such deposition on May 17, 1988. The deposition of Schultz was thereafter proffered by the parties as "Joint Exhibit 1," and was subsequently received into evidence by *Memorandum Opinion and Order*, FCC 88M-2172, released July 11, 1988.

5. By *Memorandum Opinion and Order*, FCC 88M-2012, released June 28, 1988, the following issue was added against Comstock:

> To determine whether Comstock Broadcasters, Inc. solicited a prohibited *ex parte* presentation in this proceeding, and if so, under the evidence adduced, whether Comstock Broadcasters, Inc. is qualified to become a Commission licensee.

Hearing was held on the added issue on November 15, 1988, and the parties directed to submit Proposed Findings of Fact and Conclusions of Law on that issue as well as on the Schultz deposition on or before January 13, 1989 (Tr. 481). Such Proposed Findings of Fact and Conclusions were timely filed as well as Reply Findings on January 13, and January 30, 1989, respectively, by the parties. Counsel on behalf of the Chief, Mass Media Bureau, as has been the custom in the recent past, in mainly comparative cases, did not actively participate in the Remand proceeding nor file Proposed Findings.

6. For the reasons hereinafter, this as a Further Supplemental Initial Decision, SHALL GRANT the application of Pepper Schultz.

FINDINGS OF FACT

The Original Staff Plan - (Schultz)

7. Prior to filing his application, Schultz estimated that for a real "top notch" radio station he would need 14 employees, whose salaries would total $180,000 (annually).

He said he recognized that he could not afford to do this initially, but would have to wait until the money came in (Schultz Deposition Tr. 30-32).

8. Schultz was shown pages from his October 1981 application, and asked to verify that on Question 31, of Section IV-A, he had entered zero "0" as the number of station employees (Schultz Deposition Ex. 4), and that on Question 13 of Section IV-A (proposed total hours per week of operation) he had entered "168," which is twenty-four hours per day (Schultz Deposition Ex. 5). He confirmed that his original intention in 1982 was to operate the proposed radio station with no employees, and to automate the station (Schultz Deposition Tr. 12; 19-20; Schultz Deposition Ex. 4). He confirmed that up through the hearing in March of 1984 it remained his intention to operate the station with no employees (Schultz Deposition Tr. 13; 21; Schultz Deposition Ex. 4; Tr. 44).

9. Schultz said that his plan was to rely on automation equipment and some sort of alarm system or answering device to operate the station. He was not counting on or thinking that he would use a friend, paid or unpaid (Schultz Deposition Tr. 25). He did not state that he intended to use automation in response to counsel's question at the first hearing as to how he intended to do the announcing twenty-four hours a day (Schultz Deposition Tr. 51; Tr. 44; Schultz Deposition Ex. 3).

10. However, Schultz later stated that it had been his original intention to rely on help provided by friends at no charge (Schultz Deposition Tr. 24-25).

11. In Schultz Deposition Ex. 9, Schultz stated that ". . . several close friends from the Sparks area had promised their unpaid help in running the station during the first few months." He admitted that he had not asked anyone if they would volunteer some help. He said that he "felt" that people had offered help prior to his filing of the application, because over the years they have offered their encouragement to Schultz in his plans to construct an FM station in Sparks (Schultz Deposition Tr. 80-81). Schultz stated that "[a]ll through my proceedings, I felt that if ever needed help that I would go to some of my friends" (Schultz Deposition Tr. 25).

12. Schultz stated that a man named Frank Way had offered, years ago, to assist Schultz (Schultz Deposition Tr. 25). Schultz stated that Frank Way's offer to help to Schultz did not include an offer to help staff the station; rather, it was to help Schultz construct the station. Way was employed at the time by Grass Valley Group in California (Schultz Deposition Tr. 26-28). Moreover, Schultz said he had not intended to employ Mr. Way in constructing or staffing the station. He felt he could ask Mr. Way for advice in such construction if he needed to. It would have been to help Schultz "carry the transmitter up the stairs and manhandle it around" (Schultz Deposition Tr. 29-30).

13. Schultz could not remember when they had actually volunteered help (Schultz Deposition Tr. 25; 28). Other than David Timms, whom Schultz said he felt must have offered his help prior to May 1982, Schultz could not say whether any of the people who have given affidavits in late 1984, had previously promised him before he filed his 1982 application, that they would help him staff the station. Schultz had not asked any of them, prior to filing his application, if he could rely on them if he needed help (Schultz Deposition Tr. 81-86).

14. Schultz himself made no provision for using his friends in staffing at the time he filed his application, because he felt that he would not need their help (Schultz Deposition Tr. 36-37).

15. The Commission's *Remand Order* expressed concern about Schultz's conflicting statements about when his friends had promised their help, Schultz did not go back to any of them to ask them if they remembered volunteering their help prior to May 1982, when Schultz filed his application (Schultz Deposition Tr. 87-88).

16. Schultz did not recall how he informed counsel that he had friends who could help him staff the station (Schultz Deposition Tr. 57). He wasn't sure when his counsel asked him how he intended to get around the ATS rules in operating the station without a staff. He thought it was during or after the Review Board's oral argument. "I just kind of sensed that I was going to be remanded." He said this was based upon the oral argument. He said he could not recall when the conversation occurred (Schultz Deposition Tr. 56-57; 58).

17. Schultz decided to change his staffing plans based upon opinions expressed by Review Board members during the oral argument. It was at that time that he went to his friends to see if they would help him staff the station, and to obtain affidavits (Schultz Deposition Tr. 40-41).

18. Schultz was aware of the ATS rules at the time he filed his application in May 1982, but that he was hopeful of getting a waiver or some sort of permission to operate the station without employees (Schultz Deposition Tr. 40). It was Schultz's intention to ask for waiver of the ATS rules *after* he received the construction permit. He was not sure whether that was legal or not (Schultz Deposition Tr. 42). He did not request waiver of the ATS rules at the time he submitted his application because he did not think he would be going through a hearing with a competing applicant (Schultz Deposition Tr. 42).

19. In planning his proposed operation with ATS, Schultz did not write everything out as to what he needed. He had components and "stuff that I feel I can get by with" (Schultz Deposition Tr. 64). His objective in constructing the ATS system was to do it in the most economical fashion, although he had not made specific plans with Mr. Cairns to do it one way or the other. "I didn't spend too much time figuring out everything that I have to have on this ATS panel. And I felt that with my electronic ability, I would have built it or improvised it and got it together" (Schultz Deposition Tr. 68).

20. Schultz in prior testimony (Tr. 220-222) and earlier in the deposition was aware of the ATS rule (which required station employees, not independent contractors to monitor ATS operations), and that he would probably have to get a waiver. In his affidavit (Schultz Deposition Ex. 8, p. 5) submitted in opposition to Comstock's Motion for Enlargement of the Issues, he stated that he learned for the first time that the ATS rules wouldn't permit his proposed operation when his counsel told him after the first hearing (Schultz Deposition Tr. 52-53; 54; 95-97).

21. About when he became aware that the Commission's ATS rules would not permit his proposed one-man operation, Schultz said "I would have done what I could have done by the rules and regulations. And that is a hard one to answer" (Schultz Deposition Tr. 55).

22. Schultz was not sure whether his 1985 remand hearing testimony dealing with his plan to use an ATS system and the need for waiver concerned the requirement that prior FCC approval be obtained (or notice given) or about obtaining a waiver for the use of non-employees as monitors (Schultz Deposition Tr. 146-147). He was asked by his counsel if he had read any literature on ATS at the time he prepared and filed his May 1982 application which dealt with the question of whether monitoring had to be performed by station employees, as distinguished from independent contractors. Schultz answered in the affirmative, and pointed out that some of the literature in front of him at the deposition stated that such monitoring needed to be performed by an employee who had a third class license (Schultz Deposition Tr. 144).

Financial Issue (Schultz)

23. Schultz has not submitted a list of estimates of costs that was contemporaneously prepared with his May 1982 application. He did not make any such list at the time he prepared and filed the 1982 application (Schultz Deposition Tr. 111).

24. Schultz was shown three handwritten sheets (Schultz Deposition Ex. 12). He identified them as cost and budget estimates for his October 1981 application. This was prepared 7-8 months prior to the filing of his May 1982 application. The first page had a title at the top that said "Exhibit F" (Schultz Deposition Tr. 103). Schultz was also shown a copy of the financial portion of his October 1981 application (Schultz Deposition Ex. 13). He verified that the typed numbers of those pages corresponded, in general, to the handwritten pages (Schultz Deposition Ex. 12; Schultz Deposition Tr. 107-108).

25. Schultz said he didn't redo a financial proposal for his May 1982 application because the form no longer required it (Schultz Deposition Tr. 111-112). His October 1981 application was returned approximately a month before he resubmitted the May 1982 application (Schultz Deposition Tr. 16).

26. While he reevaluated his October 1981 financial proposal in preparing his May 1982 application (Schultz Deposition Tr. 15), he did not construct a new list of expenses and costs such as Schultz Deposition Ex. 12 or Schultz Deposition Ex. 13. He, nevertheless, was keeping track of what he could and could not do (Schultz Deposition Tr. 15-16). "I looked at this [Schultz Deposition Ex. 13], and I gauged it, more or less, a mental thing" (Schultz Deposition Tr. 111). He could not be sure he did even that (Schultz Deposition Tr. 112).

27. After his October 1981 application was returned Schultz did not complete a new estimate of costs. He stated that he was aware of changes in costs by referring to Broadcasting Magazine and some books that he had (Schultz Deposition Tr. 17). By May 1982, some of the costs of equipment had gone up since he submitted his financial proposal in his October 1981 application. Some costs he said went down. The overall cost had gone up (Schultz Deposition Tr. 18-19).

28. The October 1981 application showed three-month operating costs (which included four-months of equipment lease payments and $1,000 in construction costs) of $9,140 (Schultz Deposition Ex. 12; 13). These costs included the following:

Rent (250 per mo.)	$750
Electricity & Water	$525
Telephone	$75
Gas (auto)	$250
Legal	$0
Food	$1300
Contingencies (Insurance)	$800

(Schultz Deposition Ex. 13). In Attachment B to his Submission to the General Counsel's Office and his Remand Showing, Schultz increased his estimate of utilities (water, electricity, telephone) to $1,500 (from 600), added an estimate for ATS monitoring which had not been previously included, added office supplies of $350, and reduced food and contingencies from $2,100 to $1,500. Nothing was added for legal or for auxiliary power.

29. Mr. Schultz believed that he would be able to leverage his available funds by firming up a lease-purchase arrangement on new equipment, or by obtaining a loan secured by the equipment. Even though he had entered into no definitive agreements to either end, he had investigated the costs of new equipment and the availability of both types of financing and did not believe that he would be denied credit (Remand Submission, p. 4).

30. Schultz's estimate of rent for the transmitter site and the studio site was the rent he paid on his house. He originally intended to operate from his house (Schultz Deposition Tr. 135).

31. The increased sum of $1,500 for utilities (which included telephone and all power consumption) was arrived at by discussions between Schultz and his counsel, and was not made contemporaneously with the filing of his 1982 application. He did not know what he had gauged it against (Schultz Deposition Tr. 137).

32. Although not part of his original plan of financing, Schultz stated that he could have purchased certain used transmission equipment (in lieu of the leased equipment), listed as follows. As of May 19, 1982, the "bare bones" construction costs on "used equipment" are:

Transmitting equipment (used)	$5,950
Automation equipment (some new and some used, including ATS ATS equip)	$4,000
Transmission line equipment (used)	$400
Antenna equipment (used)	$1,200
Misc. installation costs	$1,000
	$12,550

33. For the $5,950 cost estimate for a used transmitter, Schultz believed he relied on a quote from Dean Speidel, dated July 7, 1981 (Schultz Deposition Ex. 11; Attachment G; Schultz Deposition Tr. 129). Schultz could not recall if he checked with Dean Speidel in May of 1982 before filing his application to see if the Rust used transmitter was still available (Schultz Deposition Tr. 130). In any event, Schultz acknowledged that he had not committed to Speidel to buy any equipment because he did not as yet have a construction permit, "and I wouldn't spend the money until I had the construction permit" (Schultz Deposition Tr. 130).

34. As noted earlier to better form the parameters of Schultz's staffing plans and their evaluation, during the first few months. Schultz intended to operate on a full twenty-four hour per day basis, with no paid employees, but with automated programming equipment and an automated transmission system and, to the least extent possible, with unpaid help from several friends. Schultz stated "[a]ll through my proceedings, I felt that if I ever needed help that I would go to some of my friends. And I--also had offers" (Joint Ex. No. 1, p. 25). Under this plan, employees of a local telephone answering service-burglar alarm company would have monitored transmitter instruments remotely during any absences from the station, and his friends would have been available to fill in when and to the limited extent, if at all, necessary. This remained his intention as of the time of his testimony at the hearing on March 27, 1984 (Remand Submission p. 9). Schultz also stated:

> My initial plan to operate on a twenty-four hour per day basis relied in good faith on the use of an automated transmission system, because I had read extensively about such systems and was convinced that one would work for me. That was my belief when I testified in 1984, and if I had been asked to explain how I intended to operate on a twenty-four hour per day basis with no employees, I would have explained it. (Statement of Pepper Schultz associated with his Remand Submission p. 2.)

35. Shortly after Schultz testified in 1984, it was pointed out by him by counsel that his ATS plan would not comply fully with Section 73.346 of the Rules, since employees of the burglar alarm service would not be his employees, as required. Schultz had not previously been aware of the requirement that ATS monitoring be accomplished by a station employee. He then abandoned his original intention to rely on both ATS equipment and automated program equipment, in favor of a plan to rely on his originally intended automated program equipment and, to a greater extent than previously, upon unpaid volunteer helpers. His plan to make more extensive use of unpaid volunteer help was first presented to the Commission in an amendment filed with the Review Board on December 26, 1984. This was the amendment rejected by the Board on an earlier appeal.

36. The original (1980) quotation for the ATS and automation equipment was $8,850 plus $3,000 labor cost (Schultz Deposition Tr. 73; Schultz Deposition Ex. 9). The costs associated with an ATS system amounted to $600, which included transmitter controls, and miscellaneous hardware to build a real time clock (Schultz Deposition Tr. 77).

37. The quotation on automation equipment listed in Schultz Deposition Ex. 10 (Submission to General Counsel's Office, Attachment A) dated September 2, 1980, was the same equipment that Schultz stated he relied on in estimating his costs of proposed operation for the 1982 application. Although he stated the price was revised downward in 1982, he could not find the letter from the supplier, and could not recall what the 1982 quotation consisted of (Schultz Deposition Tr. 72; 73). This revised estimate of $4,000 for purchasing and installing ATS equipment was based upon a phone call with Robert Cairns. Cairns did not give him the $4,000 figure; Schultz came up with that after having several discussions with Cairns (Schultz Deposition Tr. 133-134). Whether the $4,000 figure included Cairn's labor, which had originally been quoted at $3,000, is not known.

38. In his original financial proposal, Schultz was not contemplating purchasing used equipment to construct his station, but he could if he needed to (Schultz Deposition Tr. 126-127). He was not intending to rely on used transmitting equipment in order to stay within his budget (Schultz Deposition Tr. 121; 125).

39. In his submission to the General Counsel's Office and his Remand Submission, Schultz had the following current assets:

Cash on hand or in banks	$12,607
Gold and other rare coins	$1,072
Federal Retirement Account	$3,479
	$17,158

(Schultz Deposition Ex. 11, Attachment A; Schultz Deposition Tr. 113).

40. Schultz identified as a listing of funds on hand about the time he prepared his October 1981 application. The total was $13,259 (Schultz Deposition Tr. 103). Schultz's listing of funds available in the October 1981 application (but dated August 29, 1981) was $14,370 (Schultz Deposition Ex. 13; Schultz Deposition Tr. 108). In neither of those exhibits did Schultz list gold and rare coins or put a value on them. In his Statement in Response to Comstock's Motion for Enlargement of Issues, dated April 12, 1985 (Schultz Deposition Ex. 10), Schultz stated that at the time he filed his 1982 application he had "cash in hand" in excess of $14,000.

41. At the deposition, Schultz supplied bank statements from First Federal Savings of Nevada, dated 5/18/82 (Schultz Deposition Ex. 14), the Capital Preservation Fund, dated 12/31/82 (Schultz Deposition Ex. 15), and "Leave and Earnings Statement" for pay period ending 1/8/83 (Schultz Deposition Ex. 16; Schultz Deposition Tr. 114-116).

42. Schultz stated that the Capital Preservation Fund was a money market account in which he had most of his savings. The amount of 12/31/82 was $10,529.76. The balance on April 7, 1982 was $11,443.39. The statement indicated that he withdrew $500 on May 20, 1982 (Schultz Deposition Tr. 117).

43. Schultz identified the First Federal Statement as his checking account. As of May 18, 1982, the balance was $774 (Schultz Deposition Ex. 14; Schultz Deposition Tr. 116).

44. During 1982, Schultz had $54.32 deducted from his two-week salary for retirement. Cumulative retirement as of January 8, 1983 was $4,367.11. Subtracting seven months of retirement contributions would have made the balance in May 1982 of around $3,479 (Schultz Deposition Ex. 16; Schultz Deposition Tr. 118-119).

Equipment Lease

45. Schultz's original financing plan included a lease-purchase of equipment in amount of approximately $40,000 (Schultz Deposition Tr. 121). He acknowledged that the equipment lease quotations totaling $40,000 which he had submitted in his statement to the Commission as documentation of that fact were dated after May 1982 (Schultz Deposition Tr. 123-124). As indicated in the

equipment lease proposals, they did not constitute commitments to lease to Schultz on those terms, but were subject to favorable review of his credit by their credit committee. *See, e.g.*, Schultz Remand Submission, Attachment D (Nevada National Leasing, August 30, 1982), p. 2.

46. Schultz stated that he was going to pay for the ATS equipment on a lease-purchase, or apply for it on a lease purchase. The finance charge on the labor was 1.25% per month on the unpaid balance, and that Cairns, who was the supplier, had agreed to this (Schultz Deposition Tr. 72-73). No financial provision was made for ATS and automation equipment in his October 1981 application. There was the provision for the $40,000 equipment lease, which apparently did not include the automation equipment (Schultz Deposition Ex. 13).

The Comstock Ex Parte Issue

47. On April 18, 1988, Comstock principal Robert Carroll wrote the following letter to Senator Chic Hecht of the United States Senate:

> Dear Senator Hecht:
>
> I am writing to see if your office could be of any help with a matter now pending before the Federal Communications Commission. In 1982 I filed for a new Sparks FM radio station allocation. The name of my corporation is Comstock Broadcasters. I hold 51% of the stock and Ben Akert holds 49%. Our opposition in this case is Pepper Schultz who resides in Sparks.
>
> The original hearing Judge granted the application to Mr. Schultz. On appeal to the FCC Review Board, we raised some very serious questions as to his ability to own and operate a station. On two occasions the Review Board agreed with out objections to his qualifications.
>
> We were expecting to get a favorable ruling from the commission this year but now the commission has once again thrown the matter back to the original Judge. The reason was apparently to let Mr. Schultz prove, what he says he was never allowed to prove, that he can run the station on a limited amount of capital by pre-selling commercial time, and by getting his friends to work for free.
>
> Senator, as you may or may not know this is an already oversaturated radio market. Not only is the idea of pre-selling commercials impossible, but there are stations who have been on the air for several years still operating at a loss. We simply, after six years, would like to see where this action may be headed. Any inquiries [sic] your office may be able to give to this matter would be greatly appreciated by both Ben and myself.
>
> If your staff should have any questions please tell them to give me a call. Thank you for your attention to this problem and Good Luck in your upcoming campaign.
>
> Regards,
>
> Bob Carroll

(Schultz Ex. 3, p. 2; Tr. 408).

48. In response to Mr. Carroll's letter, Senator Hecht's Reno Office sent the following letter to the Presiding Judge on April 22, 1988:

> Dear Mr. Tierney:
>
> Enclosed is a copy of the correspondence I received from Bob Carroll regarding his interest in determining the status of his application pending before the FCC for a new Sparks FM radio station allocation under the name of Comstock Broadcasters. Their docket number is 83-1207, BPH-820628AQ, and they are in opposition in this case with Pepper Schultz, docket number 83-1207, BPH-820628AQ. I would appreciate any information you could provide regarding this matter.
>
> It is my understanding that Mr. Carroll's opposition in this application, Pepper Schultz, applied for and was granted a license back in 1974 or 1975, but never put the station on the air. Mr. Carroll further advises me that this case has been referred back to you by the Review Board. Please forward your reply, in duplicate, to the attention of my Constituent Service Representative, Judy Duke, 300 Booth Street, Suite 2014, Reno, Nevada 89509. *PLEASE REFER TO THE ABOVE NAMED CONSTITUENT IN ALL CORRESPONDENCE REGARDING THIS MATTER.*
>
> Sincerely,
>
> Chic Hecht

(Schultz Ex. 3, p. 1).

49. On May 17, 1988, Edward J. Minkel, Managing Director for the Commission, sent the following letter to Senator Hecht in response to his inquiry of April 22, 1988:

> Dear Senator Hecht:
>
> Thank you for your letter of April 22, 1988, to Deputy Chief Administrative Law Judge Tierney, requesting information on the referenced proceeding and enclosing a letter from your constituent, Bob Carroll.
>
> Your letter was forwarded to my office for reply in keeping with the Commission's *ex parte* rules dealing with written communications relative to "restricted" proceedings under consideration by the Commission.
>
> Administrative Law Judge Tierney released a Memorandum Opinion and Order (MO&O) in the proceeding of May 4, 1988. A copy of that MO&O is

being provided to you with this letter. I believe that the MO&O will provide you with the information you requested.

In accordance with FCC rules as found in 47 CFR §1.1212(d), I am, by copies of this letter, providing notice and disclosure of your communications to all parties to this proceeding. Additionally, this letter and your communication will be placed in public file associated with (but not made a part of) the record in the proceeding.

Your interest in this proceeding is appreciated. If I can be of further service to you in this regard, please feel free to call upon me.

Sincerely,

Edward J. Minkel

Managing Director

Enclosure

cc: Herbert D. Miller, Esquire
David M. Hunsaker, Esquire

(Schultz Ex. 4, p. 1).

50. From those documents, the evidence reflects attendant circumstances. Following the remand of this proceeding, Messrs. Robert W. Carroll and William B. Akert, Comstock's two principals, discussed contacting "a Senator or Congressman about the case to see if anything could be done to expedite matters" (Comstock Ex. No.7). Their discussion was precipitated by a report from Mr. Carroll to Mr. Akert concerning the remand. Mr. Akert

> became rather unhappy. I blew up a little. Told him that I was disgusted with the whole situation and that we'd been going for eight years and that I thought we should do something about it . . . I remember becoming very aggravated to the fact that this application is bogged down in bureaucracy. And it started out to be just a minor investment and it's developed into a capital investment. And we haven't stuck a stick in the ground. And I just blew up and I suggested--it was my suggestion that we contact the Senator or member of the Cabinet or somebody to see what the heck is happening to us (Tr. 354-355).

Despite his frustration and concern, Mr. Akert did not ask Mr. Carroll or Comstock's attorney, Mr. Hunsaker, any questions about the procedural posture of the case or why it had been remanded (Tr. 358). He did, however, attempt to contact Senator Hecht's administrative assistant, Mr. Farr, himself (Tr. 376).

51. Akert stated that the purpose of the contact with Senator Hecht, which he had suggested (Tr. 355), had been "to see if anything could be done to expedite matters" (Comstock Ex. No. 7). He said "I was completely frustrated and I wanted the wheels of government to move a little faster, maybe" (Tr. 362). When asked "did you want the Senator or Congressman to try to do anything to push matters along?" He replied, "No, no. All I wanted was information" (Tr. 359). He was unable to identify any information, beyond that already in his possession, that he wanted (Tr. 359). He was, however, doubtful of Mr. Carroll and of Comstock's counsel (Tr. 360) and concerned that Comstock should perhaps be proceeding differently than it had been up to that point. He wanted to know whether "another avenue" should be taken by the company (Tr. 361) or whether he should terminate the project by withdrawing his financial backing (Tr. 361).

52. Carroll also related:

> I was very distressed, as well as depressed, to learn that the case was not yet over, and that it was likely to go on for at least another year, since either party would be expected to appeal an adverse decision from the Judge. It was inconceivable to me that the Commission could not have made a final ruling one way or the other on the question of Schultz's qualifications.
>
> When my counsel advised that Judge Tierney had ordered that additional written pleadings be submitted, I could not understand why this could not have been done at the Commission level, and the whole matter resolved there, rather than being remanded. I began to wonder if the case would ever be over, and whether such a procedure as was being followed was out of line. I felt that, perhaps the Senator's Office might be able to provide me with information that neither I, nor my counsel, were aware of (Comstock Ex. No. 6, p. 1).

53. Following his consultation with Akert, Carroll telephoned William Farr, who was the head of U.S. Senator Chic Hecht's Reno Office, "and asked him if anything could be done to expedite matters" (Comstock Ex. 6). Farr, who had known Carroll socially for several years, told Carroll:

> . . . that we would make an inquiry on his behalf and see what could be done to expedite a resolution of the proceeding, but that it would be necessary for him to send us a letter for us to proceed. He said that he would do so. (Joint Ex. No. 2, p. 2).

54. On April 18, 1988, Carroll discussed the status of the proceeding with counsel, Hunsaker (Tr. 419-420). He did not seek the prior advice of counsel concerning his anticipated contact with Senator Hecht's Office (Tr. 419); nor did he inquire of counsel whether specific information would be useful or should be sought via Senator Hecht (Tr. 405-406). He also stated that he knew of no specific information which might be obtained via Senator Hecht which "neither I, nor my counsel, were aware of" (Tr. 404). When asked "[d]id you believe that a Senator would be able to get information on the proceeding that was not available to your attorney?" he responded "I might have believed that, or his staff or something" (Tr. 404-405).

55. Following his conversation with Farr, and on the same day that he spoke with counsel (Tr. 402), Carroll wrote a letter to Senator Hecht, set out above at para. 47.

56. Carroll attempted to point out the merits of Comstock's case and the lack of merit of Schultz's because

> I think we wanted to point up that we thought we had a very solid case . . . I felt I needed to point that out, what our good points were, you know, instead of just writing a letter and saying please look into this matter . . .[W]e raised what I thought were some very serious questions about Mr. Schultz's ability to own and operate the station. . . I think I needed to give the Senator some background so that there would be come [sic] credence to that letter in his mind. . . I thought this was maybe our only chance to get a letter into the Senator's office and I probably needed to background everything that I felt was important to our case (Tr. 447-449).[1]

57. When Carroll's letter arrived, Farr asked his assistant, Ms. Judy Duke, to handle the matter and suggested that she call Carroll to get the name and address of the person at the FCC who was in in charge of the matter, so that she could write a letter to that person (Joint Ex. No. 2, p. 2). She did so (Joint Ex. No. 3, p. 1).

58. According to Carroll, he did not "anticipate that . . . [Senator Hecht] or his Staff would write directly to Judge Tierney or attach my letter to his own" (Comstock Ex. No. 6). However, on cross-examination he acknowledged that it would have been equally true to say that he did not anticipate that the Senator or his staff would not do so: "I didn't know what they would do; sure. I had no idea what they would do." And, he did not ask (Tr. 451). He had no idea how, without consulting the Judge, the Senator would be able to get information on when the Judge was likely to rule (Tr. 453).

> I had no idea. I know that Washington works in strange ways and I'm not privy to all the information that goes on here (Tr. 453).

Nor did he have any idea why Ms. Duke would want to know the name of the Presiding Administrative Law Judge unless she intended to communicate with him (Tr. 458).

59. During the re-direct examination of Carroll, the following exchange occurred:

> Q. Do you recall whether Ms. Duke specifically, said to you when she was asking for, information, 'who should I send this to; or, words to that effect'?,
>
> A. I believe she did; yeah.
>
> Q. Okay. Was your response, Judge Tierney
>
> A. Yeah.
>
> Q. Send what to?
>
> A. In the inquiry or whatever they were working, on (Tr. 465)[2].,

60. During his conversation with Ms. Duke, Carroll mentioned that Schultz had previously been granted a permit to build a station in Sparks, but that he had not built it. Ms. Duke

> thought this information might have some significance, since there seemed to be no reason for the FCC to grant another permit to someone
>
> who in the past had been granted one but had not built the station (Joint Ex. No. 3, p. 2).

61. Following the standard practice in her office, Ms. Duke prepared a letter and signed it for Senator Hecht, who was not personally involved. Their practice was to enclose a copy of constituent correspondence, and accordingly, a copy of Carroll's letter to Senator Hecht was enclosed with Senator Hecht's letter. Ms. Duke assumed that Carroll was aware of this practice (Joint Ex. No. 3, p. 2).

62. According to the stipulated testimony of Ms. Duke:

> Our office routinely makes inquiries to government agencies on behalf of the Senator's constituents. In particular, we often write to Administrative Law Judges in the Social Security Administration who are reviewing constituents' claims for Social Security benefits. In these circumstances, we do not regard it as improper or as a violation of the separation of powers to present information given to us by our constituents which we feel may be helpful to their cases. In preparing the letter to Deputy Chief Administrative Law Judge Tierney, I assumed that the situation was similar to my experience with the Social Security Administration judges, and it did not occur to me that this was a contested proceeding or that our letter and informational presentation might be improper (Joint Ex. No. 3).

63. In an earlier affidavit in this proceeding, Carroll had stated:

> Had it been my intention to attempt to influence the outcome of the proceeding, I would certainly not have waited until now to make such attempt, nor would I simply have asked the Senator to make an inquiry on my behalf (Tr. 414).

He opined on cross-examination at the time he solicited Senator Hecht's help that he did not believe it would have been improper to have done just that:

> Q. Your answer is then that you didn't think it was wrong--you didn't think it would have been wrong to ask Senator Hecht to come visit the Chairman of the Federal Communications Commission and demand that your application be granted?
>
> A. I guess that thought was in my mind at the time, that that would not be wrong, but I didn't ask that.
>
> Q. That that would not be wrong?
>
> A. Right (Tr. 416).

64. However, he stated that he believed it would have been wrong for him to have asked the Senator to call the Judge about the case (Tr. 452-453) and that if he had

understood it to be Ms. Duke's intention to write a letter to the Presiding Administrative Law Judge, he would at least have questioned the propriety of doing so (Tr. 458-459). In this connection, Carroll knew that such a communication would have been improper, because he occasionally has coffee with a federal judge, who declines to discuss cases that are before him (Tr. 459), and that he has known since "in my old news days when I covered court proceedings and things" (Tr. 467) that it is not right to ask judges about cases they are hearing (Tr. 466-467).

65. On May 8, 1988 (twenty days following the April 18 call to Mr. Hunsaker and letter to Senator Hecht's Office, and sixteen days following the April 22, 1988 letter from Senator Hecht to Carroll (Joint Ex. No. 3), advising that "I have already been in touch with the FCC on your behalf . . ."), Carroll and Akert participated in a telephone conversation with Comstock's counsel, Mr. Hunsaker (Tr. 374-375). A David Newman, who is not a principal of Comstock but is a friend of Messrs. Carroll and Akert, and who had earlier advised Carroll that it "couldn't hurt" to ask Senator Hecht for help (Comstock Remand Ex. No. 6, para. 3), also participated in the May 8th telephone conversation (Tr.365- 383). Akert was certain that he knew by that time that Carroll had written his letter to Senator Hecht (Tr. 387), and he "thought that it was good that the letter was written and in fact, I was fairly well impressed that Senator Hecht acted as fast as he did; that he'd got started" (Tr. 388). Although he did not believe that the subject of the letter had come up during the May 8th conversation (Tr. 376), Akert could think of no reason why it would not have come up, and that for all he knew, it could have (Tr. 381). His only specific recollection was of having questioned Mr. Hunsaker "as to why it was taking so long; why it was dragging" (Tr. 382) and of having expressed his frustration to Mr. Hunsaker (Tr. 382).

66. Carroll stated that the subject of his letter to Senator Hecht did not come up during the May 8, 1988 telephone conversation because it was not important enough (Tr. 410), and because "I thought that it might be an affront to him professionally that I had written a letter to somebody else to see what the status of the proceeding was" (Tr. 410).

67. In addition to the May 8, 1988 telephone conversations in which Messrs. Carroll, Akert and Newman participated, Carroll had telephone conversations with counsel, Mr. Hunsaker, about this proceeding on the following dates:

March 17, 1988
April 1, 1988
April 18, 1988
April 22, 1988
May 11, 1988 (Tr. 422-423).

Carroll stated that during none of these conversations with counsel was any mention whatever made of any communication with any elected representative (Tr. 423).

ULTIMATE FINDINGS AND CONCLUSIONS

Financial Qualifications and Staffing (Schultz)

68. The *Remand Order*, on this issue affecting Schultz, sets the parameters of inquiry: (a) whether his original financial plan was viable; (b) whether his "virtual one-man operation" could be effectuated; (c) whether material discrepancies between his August 7, 1987 submission and the record exist and, if so, their consequences; and (d) whether the adequacy of Schultz's financial and staffing plans lend support to the previously made findings of good cause for acceptance of his 1975 financial and staffing plans. Nothing which has been earlier and clearly decided in this seeming epic-like trilogy, needs be revisited, albeit, that the notion of *stare decisis* may not be controlling here.[3]

69. Consistently throughout the various stages in this proceeding, Comstock has characterized Schultz's financial and staffing proposals as "dissembling, misrepresentation, naivete or lack of touch with reality." What, then, does the record evidence on *Remand* suggest or reasonably infer?

70. In his original financial plans in 1982, Schultz had an amount of $17,158 available comprehending assets in cash, in banks, precious metals and a recoverable federal retirement contribution; in addition his other assets, including an automobile, broadcast equipment, programming materials and office furniture amounted to $31,542. His original planned operating expenses were $4,450; he calculated that by acquiring additional used equipment needed to put his station on the air amounted to $42,550; thus, a total cost of planned construction of $16,980 *versus* $17,158 available. Comstock argues that the majority of Schultz's assets are "non-liquid"; that only with supporting documentation of current liquidity, Comstock says is lacking, can such assets be accepted, citing *Rose Broadcasting Co.*, 68 FCC 2d 1242, 1246 (1978) and others; that he has "double-counted" his "other assets" to the extent of $10,500 of his claimed $31,542 "net liquid assets"; indeed, adds Comstock, that his automobile, broadcast equipment, programming materials and office furniture, totaling $10,500 cannot be realistically "cashed out" in order to pay for (or lease) the additional equipment, materials and operating expense items be still needed under his 1982 proposal. He would then "have only $21,042, not $35,542," adds Comstock.

71. The argument of Comstock at first glance, appears plausible, at least to the extent that the sum of $21,042 not $35,542 as net liquid assets was available at the outset to Schultz. Whether this is accurate and thus permits the somewhat quantum leap proposed by Comstock that this condition "more than justified the Review Board in refusing to accept a post-designation financial amendment proffered three years after Schultz filed his application" is yet to be addressed under the evidence.

72. At the 1982 filing of his application, Schultz planned the use of an automated transmission system (ATS) to be controlled remotely at a local burglar alarm company during any periods he was personally absent from his station; that to the extent he needed further assistance, to ask friends to provide whatever help he might need to staff the station, but he abandoned such plans because the Commission's Rules extant required such monitoring be done by station employees not contract personnel. Such Rules, Schultz argues, have since changed and Schultz's original proposal "would have been

entirely consistent with them." Without the ATS, Schultz filed a proposed amendment to utilize the help of "friends" in December 1987, a matter later rejected by the Review Board.

73. A chronology of Schultz's staffing plans besides claiming to be able to operate on a "seventy-two hour per week schedule," Schultz's staffing proposal has obviously changed during the nearly seven year duration of this proceeding, in response to changing conditions. It has gone from slight reliance to the minimum extent necessary on help from "friends" at the beginning, to substantial reliance on unpaid friends later, to no significant reliance on unpaid friends in his most recent financial and staffing amendment (Schultz Proposed Findings p. 29, para. 12).

74. On the matter of volunteer help which was cited in the *Remand Order*, Schultz says that "he had always intended *some* reliance on volunteer help" and had he been asked to explain his intended "twenty-four hour per day basis" with no employees he would have explained it; but, he was not asked, noting that on counsel's advice he would not volunteer unasked information; this relating to his testimony in 1984. (Yet, this and the most recent evidence do not disclose his counsel's asking such helpful information, for example on direct or redirect examination.) Indeed, his explanation of the "discrepancy" is "adequate and convincing," Schultz adds. On this it is footnoted "[i]n retrospect" Schultz's counsel "should have explored the matter" on redirect examination (Schultz Proposed Findings p. 31, fn. 22).

75. Again, Schultz reverts to a matter apparently considered and decided at appellate levels, the amendment he submitted in 1985 on the establishment of his financial and staffing qualifications, a matter, he repeats, "which was unopposed" and adds "[i]f that amendment was, after all, properly accepted then Mr. Schultz is now financially and in every other respect qualified" (Schultz Proposed Findings p. 1, para. 16). If that matter properly may be revisited, that, too, as yet is to be addressed.

76. In sum, then, in the absence of acceptance of his 1985 amendment, under the evidence addressed to Schultz's original financial and staffing plans, there, remains an applicant whose operational plans for his proposed station are marginal in realistic accomplishment. While the "double counting" characterization by Comstock will be passed over concerning Schultz, such things as his automobile and office furniture, it would seem in this sometimes Never Never Land of comparative choice, even the modest treasure of "piggy banks" might be unearthed to achieve passing minimal merits in financial qualification; thus, the original 1982 financial posture of $31,542 comprehending also the minimum needed for three months operation and no employee salaries for that period is found to be that sum, $31,542. His proposed leasing arrangements, though not firmly committed, would otherwise be available to a successful applicant. *Armando Garcia*, 64 RR 2d 1005 (Rev. Bd. 1988).

77. The other vital matter addressed in the *Remand Order* is co-extensive with Schultz's financial viability, that is, his proposed staffing plans. His proposed ATS monitoring plan, without station employees, would have been at great odds with the then governing Rules, he did abandon that plan, and decided to rely on "friends." Also, his proposed original plan "to operate on a twenty-four hour basis" daily except Sunday, with prodigious efforts, might be achievable when translated into the requirements of Rule 73.1740 mandating a *weekly* schedule of seventy-two hours. This condition, of course, ignores the common frailties of human nature, among which are unpredictable bouts with illness and other human burdens. Yet, and not without supposed predilection or pre-disposition in anyone's favor, Schultz's staffing, as originally conceived, ATS having been abandoned (quite properly) would also be marginal in its achievement, teetering, but not wholly unreasonable. One needs but recall the disposition in *Bisbee Broadcasters, Inc., et al.*, 48 FCC 2d 291 (Rev. Bd. 1974), where among other matters, it is observed:

> First, the Commission has no rigid rules or standards prescribing personnel or staffing requirements; there is only a general one that there be a reasonable likelihood that an applicant can effectuate its proposed operation with its staff. Secondly, while Wrye's staffing proposal might be frugal, rigorous and demanding, the Board, in its expertise, does not believe that it is so far below the average of small market stations, sometimes referred to as 'mom and pop' stations, that it must be rejected as incapable of effectuation . . . at 292-293.

78. Here, an unmarried rigorous and fairly youthful Schultz, there a heavily occupied husband and equally occupied housewife and mother of two children, one a handicapped child; here Schultz with the help of "friends," there with part-time student employees. Though not entirely analogous, Schultz, too, would be capable at the outset to meet a "rigorous and demanding schedule."

79. Accepting that Schultz's plan, undermines the public interest, argues Comstock; indeed, that "no plan at all" will be sufficient henceforth in matters of financial and staffing should Schultz's proposal be deemed qualified; such a proposition "should be rejected, vehemently, here and now." *Coastal Bend Television, Inc.*, 54 RR 2d 367, 371 (Rev. Bd. 1982). Comstock concludes that neither *Azalea* (*Azalea Corp.*, 31 FCC 2d 561 (1971), nor *Crosthwait* (*Crosthwait* v. *FCC*, 584 F.2d 550 (D.C. Cir. 1978)), permits the Commission to snub proposed curative amendments, such as those Schultz's amendments, when the fundamentals of "good cause" are absent.

80. But the mission here is to test and appraise the "adequacy" of Schultz's 1982 financial and staffing plans and, if so, under the evidence, whether that test lends support to the previously made findings of good cause for acceptance of his 1985 financial and staffing plan. They have been found *adequate*, albeit barely so; and it is so concluded. With that premise, even though at the outset of his filing in 1982, being a supposed kind of classic in naivete, perhaps prompted (erroneously) by the absence of challenge in the *Hearing Designation Order* (*HDO*), (MM 83-662, released November 10, 1983, and that *HDO's* acceptance as qualified (para. 17)). Schultz remained fully comfortable in his quest; as the time in this long journey progressed and with the later engagement of experienced communications counsel, that inert condition was attacked, particularly by his challenger at bar. Comstock, and then he got about getting his house in better order, not as Comstock would have it in *1982*, but alerted and spurred by that Comstock challenge in the months following the *HDO* in November 1983, with the scheduled hearing date, January 12, 1984, later changed to January 13, 1984 and again to March 27, 1984. Thus, it would appear

from that chronology, the Schultz 1985 amendments cannot, in fact, be characterized as "three years late"; perhaps a little over a year.

Ex Parte Issue (Comstock)

81. The earlier findings here would permit, more compel, the conclusion that the letter written to the Presiding Judge by Senator Hecht constituted a prohibited *ex parte* presentation. Such letter not only could not be classified, as Comstock would have it, a simple "status inquiry," but much more and went to the very merits of a matter actively *sub judice*. Further, the letter enclosed copy of a letter Comstock's principal, Carroll, seeking the Senator's "help" in Comstock's "solid case" and added "there were some very serious questions about Mr. Schultz's ability to own and operate a station." Akert, also a Comstock principal, albeit a described "passive investor" (49%), was the prime mover in contacting the Senator. Akert was doubtful, perhaps distrustful, of the efficacy of Carroll and Comstock's counsel in getting greater results and "wanted the wheels of government to move a little faster, maybe." He did not seek the "information" he claimed he needed from either his co-principal Carroll or Comstock's counsel, who, particularly counsel, could have provided the information he supposedly needed.

82. Also, Carroll, the other Comstock principal, exclaimed his frustration at the remand of this proceeding and that he, like Akert, sought to have this proceeding expedited and telephoned to Senator's assistant, Farr, asking him "if anything could be done to expedite matters," Carroll is also the one who identified the person to whom the Senator's letter should be sent, upon inquiry by an assistant to the Senator, Ms. Duke, that is, the person who would rule on the proceeding. He did relate, at trial, that he did not anticipate that the Senator would write directly to the Judge, "[y]ou just don't do those things." He also stated when he initiated the contact he had no idea that any contact would be "wrong" but, on reflection, he would have questioned its propriety. Indeed, Carroll, referring to his earlier days as a reporter, that it is not proper to ask judges about cases they are hearing. Also, the evidence reveals that neither Comstock's other principal nor Comstock's counsel was asked whether congressional intervention should be sought nor was it advised by either; that it had occurred despite the fact that counsel and Carroll spoke on the telephone about the status of the proceeding the very day, April 18, 1988, Carroll sent his letter to the Senator's Office.

83. Schultz poses the notion, in his Proposed Findings, that Carroll "knew or at least was very concerned that it had been wrong to seek congressional intervention, did not want to be so advised by counsel, lest he then be forced to bring that intervention to an end prematurely before it produced the desired results . . ."; that Comstock's "alleged ignorance of the *ex parte* rules . . . rings exceedingly hollow," noting, particularly, "Carroll's substantial experience in broadcasting" an experience self-described by Carroll. Though this Schultz thesis and inference are his, they are not off-target and belie, in great measure, Carroll's suggested "ignorance" of the existence of the *ex parte* rules, a person with admitted broadcast experience but, Comstock would have it, more familiar with the FCC Rules in "Part 73, not Part 1."

84. At some length, Comstock argues, that "even when a prohibited *ex parte* presentation has occurred, no sanction will be imposed where there is no evidence of intent to violate the rules or to influence the Commission by surreptitious means," citing *Black Hills Video Corp.*, 6 RR 2d 289 (1965) and other. Indeed, in a moment of complete candor, a kind of open admission--and a kind of *quantum* reverse defensive somersault--that even if a prohibited *ex parte* presentation occurred here; "the conduct in question is but a single, isolated instance" (Comstock Proposed Findings at para. 131, p. 51).

85. Schultz submits that having had the burden of proof under the *ex parte* issue, Comstock has failed in that burden and noting that "[a]ll violations of the *ex parte* rules, are serious, since they potentially affect the adjudicative process"; that the sanction here, unlike in cases cited by Comstock, should not simply be dismissal without prejudice of the Comstock application, but rather "the dismissal with prejudice of Comstock's application with attendant findings of lack of qualification premised on "adverse candor findings" underlying the inconsistencies in the testimonial evidence of Comstock's principals.

86. In stressing the importance of prohibited *ex parte* matters, the Court in *WKAT, Inc.* v. *FCC*, 296 F.2d 375 (D.C. Cir. 1961), *cert. denied* 368 U.S. 841, stated:

> This doctrine applies to adjudicatory functions of an administrative agency. This is not a mere technicality. Surreptitious efforts to influence an official charged with the duty of deciding contested issues upon an open record in accord with the basic principles of our jurisdiction, eat at the very heart of our system of government--due process, fair play open proceedings, unbiased, uninfluenced decision. He who engages in such efforts before an administrative agency is fortunate if he loses no more than the matter involved in that proceeding (at 383).

87. Comstock pointedly argues no "intent" on the part of its principals to violate the *ex parte* rules. Really? In its most accepted, even in its most prosaic sense, "intent" connotes, "design, resolve or determination with which a person acts"; *Witters* v. *United States*, 106 F. 2d 837, 840 (70 App. D.C. 316 (*albeit* in a criminal matter)), "being a state of mind, is rarely susceptible of direct proof but must ordinarily be inferred from the facts." *State* v. *Walker*, 154 S.E. 866, 867. And "intent" is a purpose to use particular means to effect a certain result. Both Comstock principals, Akert and Carroll, by their conduct using the otherwise innocent agency of a Senator's Office, sought to influence this adjudicatory forum, not by permissible status inquiry, but by surreptitious efforts to have the supposed power of that Office impermissibly intervene by pointing out the merits of their case and the flaws of their opponent Schultz; a matter directed at the very heart of an ongoing adjudicatory proceeding. Surely, conduct, not isolated, in the nature of events in the remote past, but fully active ongoing events at the very times the very prohibited conduct took place in April and May 1988. Conduct which flies in the face of even warm reason, born, perhaps, of frustration, maybe anger, yet human emotions hardly the antidote for wanton mischief. As such, mitigation to any discernible degree is totally wanting; the "isolated instance" suggested, a subversion of either reason or even compassion. Comstock has, by its conduct, consciously flouted even the modest prerequisites for eligibility not inordinately difficult but expected

qualifications as a prospective licensee of high public trust; hence, it is compelling that its application be denied.

88. Where does the evidence leave Schultz under the *Remand Order* ? In his proposed Reply Findings Schultz suggests that the Commission's recent disposition in *Memorandum Opinion and Order* in *Opal Chadwell*, FCC 89-7, released January 31, 1989[4] affirmatively supports his thesis that he may properly rely on his 1985 financial and staffing amendments, a matter which did not gain approval of the Review Board but was particularly alluded to by the Commission in its *Remand Order*.[5] There, after noting Schultz's submission to the General Counsel, the Commission stated: "Schultz contends that his submission demonstrates that his original, unamended staffing and financial proposals were viable" (*Remand Order* at para. 5). And later after reviewing the staffing and financial proposals, the Commission added: "We find the pleadings before us raise substantial and material questions as to Schultz's financial plan. As in the case of Schultz's staffing proposal, we are troubled by the seeming discrepancy between his present showing and the existing record . . ." (*Remand Order* at para. 11). Respecting the reliability of Schultz's listing of costs and funds reflected in the balance--not previously submitted--the Commission adds that Comstock should be given the opportunity to test those figures. That Comstock has done by noting, among other objections, that the *Remand Order* does not relate to Schultz's post-designation amendments but solely whether Schultz's "unamended proposals" were to be found adequate; not whether "Schultz has demonstrated good cause for amending out of his problems. That is not an issue and the question is not properly before this forum," adds Comstock (Comstock Reply Findings at pp. 11-12). Comstock's Response[6] to Schultz's invocation of *Opal Chadwell* argues: "As usual Schultz does not tell the whole story,"; that if "he wishes to have the benefits of the *Chadwell* case, thus, have the question of good cause for his February 1986 amendments reconsidered, he must take the bad with the good," i.e., suffer the imposition of a "lack of candor issue" earlier suggested by the Review Board. 103 FCC 2d 105 (FCC 86R-2, released January 24, 1986), para. 13, n. 9; para. 3, n. 4. This, not to mention, says Comstock, "Schultz may not rely on non-liquid assets without relevant appraisal."

89. Comstock's Response fails in persuasion on at least two counts. First, this forum finds and has found, whatever the imperfections of his proposals, Schultz as found *infra*, under the evidence, has taken no undue liberties with truth; rather, perhaps naive, no prevaricator; his opponents have been found greatly less than forthright. Hence, the necessary premise to "lack of candor" is, at best, amorphous. Secondly, his original staffing and financing plans, too, have been found adequate, viable and reasonably capable of effectuation. At this hour were the question of "candor" to be posited, it would not affect Schultz but others. With the disposition here, and to gratefully forgo the seeming infinity of this epic, that route shall be mercifully avoided.

90. Earlier, it has been found that under his original financial proposal Schultz had available in combined assets the sum of $31,542; a financial proposal consisting of $17,158 in current assets, miscellaneous assets and other assets with total projected costs of construction of $16,980. His projected leasing arrangements for broadcast equipment, even though contingent subject to suppliers credit approval, were predicted on reasonably achievable leasing costs of $6,422 for three months operation and initial operating expenses of $4,430 amount to a total of $10,852 suggesting a surplus of some $6,306 over the $17,158 in current assets. Thus, it has been found that the Schultz original financing plan was adequate, and, in that sense, viable.

91. A harder look at his original staffing plan, a "virtual one-man operation" also must be assayed under the evidence. Though his original plan was to operate on a twenty-four hour per day basis with ATS, a proposal later abandoned, taking into account his good health and youth, he could have "even without the help of anyone" operate his proposed station on a seventy-two per week basis, required under governing Rules. Austere, possibly heroic, no doubt, but humanly impossible, not.

92. A note at this point on the observed demeanor of Comstock's principals, Akert and Carroll as well as Schultz, during the Remand hearing. Unlike Schultz's less urbane person characterized at times by Comstock as "naive" and a "dreamer," among others, Akert and Carroll, the Comstock principals, are of a greatly different sophistication than Schultz. Both, though described by Comstock as "lay persons" who acted out of "ignorance," are experienced business persons, one of whom, Carroll, has had intimate and extensive broadcast experience over the years 1954-1981 in both radio and television and in such leading positions as "News Director," and a university lecturer, among others, in broadcast related subjects. Hardly a "lay person" when it comes to the field of broadcast enterprise; and who by virtue of that experience can find little refuge in the sanctuary of "ignorance." Akert, indeed, in response to inquiry at trial the reasons for contacting the Senator "was questioning Bob Carroll's credibility, my counsel's credibility and the bureaucracy itself . . ."; and posited the notion that what else is a Senator there for "if he isn't here to help his constituency." And Comstock admits that "had Comstock's counsel been consulted in timely fashion, we would not be litigating this issue" (Comstock Proposed Findings p. 17, para. 37).

93. Yet, neither Comstock principal recanted, with no expression of chagrin, regret or remorse but professed self-assurance of propriety and total innocence. Indeed, addressing Schultz's charge of intent to solicit a prohibited *ex parte* presentation, Comstock borrowing a page from the Spanish Inquisition,[7] and not unlike its earlier misapplication of Aristotelian method of reasoning, likens Schultz to the Grand Inquisitor's methods "of rooting out heresy and witchcraft"; hoping "that our present system of constitutional justice has arrived at a slightly higher plane of logic and civilization." Without the "rack" or other barbarous torture employed by anyone, Comstock's undoing here is totally self-inflicted by the disclosure in the evidence of its calculated intent to have the eminent office of an outside party openly and improperly intrude in an ongoing adjudicatory proceeding.

94. Thus, Schultz somewhat the dreamer, perhaps more than a bit naive in the genesis of his plans for a broadcasting station there in Sparks, Nevada was, nevertheless, throughout this long journey, ever forthright, responsive and truthful, enduring long periods of repeated in depth cross-examination. Messrs. Carroll and Akert, both declining to seek "information" on the status of this proceeding from the most likely source, their counsel, throughout this protracted case, chose, instead contacting the Sena-

tor's Office, were greatly less than candid and forthright choosing, rather than acknowledging "the obvious fact that a prohibited *ex parte* presentation has occurred," to affirmatively deny any such thing took place, this despite other conduct in evidence Carroll's admission at hearing, among others, that in his letter to the Senator he attempted to point out the merits of the Comstock case and the flaws in Schultz's; taking into account Comstock's admitted wrongdoing as, at most, "an isolated instance," this is trifling with the truth and reprehensible.

95. As found earlier, the time frame between the setting of the original contested issue here in the *HDO*, *supra*, released November 18, 1983, the Initial Decision of July 30, 1984 (FCC 84D-49), and the filing of Schultz rejected 1985 amendments is not that remote which might otherwise undermine a principal criterion of "good cause" affecting post-designation amendments, that is, timeliness. *Cf. Alvin Communications Corp., supra;* the other principal criteria would not be affected here; the great duration of this proceeding culminating in the Commission's *Remand Order* would be dispositive of the other governing criteria. *See Azeala Corp., supra.*

96. It has also been found that his *original* financial and staffing plans of *1982* though minimal and austere, indeed requiring Herculean personal efforts to meet minimum weekly broadcast hours, nevertheless, however barely so, were adequate. That perhaps bare adequacy provides, in light of the maturation of Schultz's better grasp and understanding of the need for greater viability of his proposals, the necessary premise of whether good cause exists for permitting amendments of those proposals as posited in the *Remand Order*. Those 1985 Schultz amendments provide better assurance of the viability of his proposals and, thus, suggest their revisit and acceptance.

97. In sum, finding Schultz's original financial and staffing proposals of 1982 adequate; buttressed by the more assuring 1985 amendments, there is no remaining doubt to question the efficacy of Schultz's proposals; hence, it is again concluded that Schultz is fully qualified to be a Commission licensee. And under the other earlier found comparative considerations affecting Schultz, not at issue here, Schultz, the evidence compels, must be the prevailing applicant.

98. This is assuredly so, whatever the marginal nature, as some would have it, of the adequacy of Schultz's original staffing and financial proposals; that adequacy has been raised under the convincing evidence here, to fully assuring; on the other hand, the evidence at bar under the *ex parte issue* convincingly and completely undermines the efficacy of the Comstock application, compelling denial. For, in this mind, an incipient marginal applicant, were that so, is far better than an unfit one.

Accordingly, the application of Pepper Schultz for the captioned facilities at Sparks, Nevada, may be AND IS HEREBY GRANTED; that being so, the application of Comstock Broadcasters, Inc. for those same facilities must be AND IS HEREBY DENIED.[8]

IT IS SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

James F. Tierney
Deputy Chief Administrative Law Judge

FOOTNOTES

[1] Mr. Carroll had previously suggested that he had easy access to Senator Hecht:

> Mr. Miller, if I wanted to solicit Chic Hecht's help, I would have gone in and seen Chic Hecht on a one to one basis. I would not have written a letter to his administrative assistant. And I'd of said, Senator Hecht, we need some help with this. We want to bring this thing to an end. Please do whatever you can do (Tr. 413).

[2] Evidently unsatisfied with these responses, Comstock's counsel tried again:

> Q. Refer to her statement. You see where she says find out information and who I should send it to?
>
> A. Uh-huh
>
> Q. Now, do you--I'll ask you to think again. Do you recall whether she asked you that question--'who should I send this to?'
>
> A. I'm not sure she asked me who she--it seems to me, Mr. Hunsaker, that she said is Judge Tierney the judge.
>
> Q. So it sounded as if she already knew the information?
>
> A. Yeah. I'm sure that that's right (Tr. 465-466).

Later, on examination by the Presiding Administrative Law Judge, Mr. Carroll stated:

> I just--that had never even occurred to me that you would be contacted. That never occurred to me. *You just don't do those things.* (Tr. 475) (emphasis added).

[3] *Cf.* The doctrine of *stare decisis* is not generally applicable to the decisions of administrative tribunals. *Kentucky Broadcasting Corp.* v. *Federal Communications Commission*, 84 U.S. App. D.C. 383, 385, 174 F.2d 38, 40 (*Policy Statement on Comparative Broadcast Proceedings*, 1 FCC 2d 393, fn. 2 (1965).

[4] Addressed by Schultz in greater detail in "Memorandum of Law" of February 7, 1989. This, Schultz relates, is due to the fact that only an earlier News Release reflected the Commission's action.

[5] Schultz filed Motion for Leave to File Memorandum of Law on February 7, 1989; because it faithfully reflects Commission action and serves the ends of justice in a fuller explication of current Admission disposition in an apposite matter, the Motion IS GRANTED and the accompanying "Memorandum of Law," ACCEPTED.

[6] Comstock filed a Response on February 16, 1989, which, too, has been fully considered.

[7] Historians generally accept the Spanish Inquisition as the reorganized version of the "Inquisition" or "Holy Office" being instituted in the 15th Century--1478--under the Spanish Sovereigns; the "Inquisition" or "Holy Office" being established in the 13th Century--1200's.

[8] In the event exceptions are not filed within 30 days after the release of this Further Supplemental Initial Decision and the Commission does not review the case on its own motion, this Further Supplemental Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d) (47 CFR 1.276(d)).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-424

In re Applications of

TIM LAVENDER File No. BPH-870910NT

For Construction Permit for a
New FM Station on Channel 290A
in Whitley City, Kentucky

Appearances

Mark Van Bergh, on behalf of Tim Lavender; and *Norman Goldstein*, on behalf of the Chief, Mass Media Bureau.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: March 9, 1989; Released: March 16, 1989

PRELIMINARY STATEMENT

1. Two applications were designated for hearing in this proceeding to select a permittee to operate a new FM station on Channel 290A in Whitley City, Kentucky. Only the application of Tim Lavender (Lavender) remains. Lavender's application could not be granted because of an unresolved financial qualification issue designated against Lavender. *Hearing Designation Order*, DA 88-1296, released September 14, 1988. On February 22, 1989, Lavender filed a "Petition For Leave To Amend." The proffered amendment provides an affirmative financial certification as well as supporting documentation for the certification. Lavender filed on the same date a "Motion For Summary Decision" on the specified financial issue. On March 3, 1989, the Mass Media Bureau filed Comments supporting grant of Lavender's application.

FINDINGS OF FACT

2. Lavender estimates his total costs of construction and three months of operation at $152,856. Lavender's cost breakdown appears to be reasonable and his estimate is accepted. To meet these costs, Lavender has demonstrated the availability of $170,932.50 as net proceeds from a loan commitment, for which the collateral requirements have been met. Lavender has a net cushion of $18,076.50. The designated financial issue is, therefore, resolved in Lavender's favor.

CONCLUSIONS

3. The financial issue is resolved in Lavender's favor. There are no other basic qualifying issues pending against Lavender. Lavender's application is granted.

Accordingly, IT IS ORDERED, That the "Petition For Leave To Amend" and the "Motion For Summary Decision" filed February 22, 1989 ARE GRANTED; the amendment IS ACCEPTED; the financial issue IS RESOLVED in Tim Lavender's favor; the application of Tim Lavender IS GRANTED;[1] and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release, pursuant to 47 C.F.R. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 3, 1989

Commissioner Patricia Diaz Dennis releases separate statement in Further Notice of Inquiry and Notice of Proposed Rule Making, FCC 88-249, released September 22, 1988, 3 FCC Rcd 5849.

FEDERAL COMMUNICATIONS COMMISSION

SEPARATE STATEMENT
OF
COMMISSIONER PATRICIA DIAZ DENNIS

In Re: The Matter of Telephone Company Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266.

I write separately to state my own tentative conclusions and approach to local exchange carrier ("LEC") participation in cable television. In so doing, I disavow some assumptions and conclusions in the Further Notice of Inquiry and Notice of Proposed Rulemaking ("FNOI/NPRM"). I also address a few of the comments on this item.

The public's interest is in having the LECs advance beyond providing solely "plain old telephone service" ("POTS"). I have personally advocated greater LEC participation in the information age to benefit consumers.[1] For example, I argued for modifying the 1982 AT&T Consent Decree to allow the Bell Operating Companies ("BOCs") to provide certain information services.[2]

We have the opportunity in this FNOI/NPRM proceeding to consider and recommend how LECs might best be able to participate in broadband communications to the benefit of consumers. Again, I would like to harness the capabilities, resources, and innovative potential of the LECs to spur the development of new services.

At this point, however, the record does not support the tentative conclusions of the FNOI (at para.10). A policy of "open entry by telephone companies . . . subject to safeguards" (para.10) *could*, under certain conditions, promote new services and technologies, and the creation of efficient integrated broadband networks. The record, however, does not support the tentative conclusion that it *would*.

Further, the tentative conclusion does not state what is apparently an underlying assumption about how the LECs would enter the cable business in their service areas. For the policy to have the best chance to achieve the desired results, "open entry" would have to be limited to *de novo* entry.[3] If LECs were allowed unconditional entry into the cable television business, they could (and probably would) do so through acquisition of existing systems. This might increase the resale values of cable properties, but it would not necessarily promote the development of new services and technologies. If LECs invested in existing conventional coaxial cable systems, they would have no particular incentive to develop integrated broadband fiber networks.

Some comments on an integrated network that would supply voice, data and video service over one wire (or fiber) apparently assume that this would be the only communications pipeline. The assumption is that this one pipeline would be so efficient that no other facilities-based service provider could compete. Advocates of LEC ownership of cable argue that traditional coaxial cable operations will be supplanted by integrated broadband networks.[4] The corollary assumption appears to be that local exchange voice/data service is a natural monopoly with which cable companies cannot hope to compete.

We should not be so quick to assume that cable companies and LECs, at least in the short term, cannot be competitors. We should not necessarily assume that local telephone service or cable service is a natural monopoly. We should give competition a chance. Technology may yet take a turn which could justify two or more competing communications pipelines.

As long as cable service is provided by an entity independent of the LEC in its service area, the cable company presents the threat of becoming a competitor for at least some local exchange voice/data communications. If LECs became the only cable operators in their service areas, they would become their own best potential competitor--which would mean no competition at all.

The reverse is also true. LECs are a disciplining force on cable. As the comments in this proceeding demonstrate, cable companies have long been aware that LECs were eyeing their market. Better than this potential competition would be the salutary effect of actual competition which might emerge from the LECs building a second broadband communications network.

We have prohibited LEC ownership of cable, in part, to preserve cable as a potential competitor of the bottleneck local exchange monopoly of the LECs. I do not believe that the costs of maintaining this "two pipeline" policy have been too high.

Limitations on the LECs providing broadband communications have not been shown to deprive the public of services thus far.[5] Most of these "new services" that the cable industry is criticized for not providing are not inherently broadband services (videotex, data transmission, etc.). They could be provided by telephone companies over narrowband wires. Were LECs to add broadband capability, this might speed the introduction of other services such as high quality full motion video conferencing and "video on demand."

Truly innovative new services could include the integration of presently known narrowband and broadband services into presently unknown hybrid services. On the communications playing field, the LEC now is on one side with its two-way, switched narrowband services and cable is on the other side with one-way, unswitched broadband service. The "new services" are the two-way, switched broadband and narrowband/broadband hybrid services in the middle.[6] As long as we hold open the option for either the LECs or cable companies to contend for this middle ground, we enhance the likelihood that competition will spur them to provide new services at reasonable prices.

If and when LECs do enter the broadband communications field, my present preference is to adopt the NTIA "video dial-tone" approach. This alternative holds great potential, at least as an interim step. Not the least of the advantages is that it could greatly enhance the diversity of programming and viewpoints available to viewers. NTIA assumes, however, that the 1984 Act requires that the common carrier's customer for "video dial-tone" service must be franchised, *i.e.*, awarded a cable franchise by a local government entity. I make (and have made)[7] the opposite assumption. Unfortunately, the 1984 Act is unclear about who must be franchised.[8] We may need to ask Congress to clarify it.

The New York State proposal for a LEC broadband common carrier service is also worthy of consideration.[9] It differs from the NTIA approach in that LECs would, at the option of state regulators, be permitted to supply video programming services, subject to appropriate safeguards. New York argues against federal preemption, saying that experimentation by many states will likely produce the most effective regulatory structure in this new broadband video services market. New York also says that state regulators will need to take care that basic exchange service customers do not subsidize these new broadband services.[10]

New York's comments, and similar comments by Florida.[11] highlight the importance of the issues of whether and to what extent federal and/or state authorities should regulate an integrated broadband network.[12] New York also adds the corollary issue of whether local franchising authorities should be excluded from regulation of video services provided by common carriers.[13]

CONCLUSION

The Commission's tentative conclusions may ultimately be borne out by further comment and analysis. However, I cannot now support a recommendation that Congress permit full telephone company participation in the cable television business in their local exchange service areas.

What this Commission or any Commissioner concludes, though, is not as important as *how*. Congress will benefit most by the facts and insights this agency can supply in the exercise of its expertise.

I welcome comments in this FNOI/NPRM proceeding on how we can realize more, not less, competition in both cable and local exchange service. For LECs to extend their existing narrowband communications monopoly into broadband communications would not serve the public interest. We should, instead, seek to channel entry of the LECs into this new field so as to unleash the most productive competition with cable. In the bargain, consumers could realize innovative services at competitive prices. In the long run, such competition may prove unworkable in whole or in part. But, for now, our goal should be the development of at least two broadband networks.

FOOTNOTES FOR STATEMENT

[1] Last year, I described the kinds of information services which LECs could and should be allowed to provide--Patricia's Augmented Telephone Services ("PATS"), I called them, as distinguished from POTS. (Address by Commissioner Patricia Diaz Dennis, Practising Law Institute/Federal Communications Bar Association Conference (December 10, 1987).)

[2] The March 7th Order of the Decree Court earlier this year made this modification. *United States v. Western Elec. Co., Inc.*, Civil Action No. 82-0192, (D.D.C. March 7, 1988).

[3] *See* New York State Department of Public Service Reply Comments ("New York Reply"), p. 4 ("[T]elcos should not be permitted to acquire existing cable systems in their franchise areas. . . But they should be permitted to build competitive systems, whether separate or integrated with their telephone operations.")

[4] *See* comments referenced at paras. 23-24 of FNOI. *See also* discussion of the "economics anticipated" from an integrated network in *Revision of the Processing Policies for Waivers of the Telephone Company - Cable Television Cross-Ownership Rules*, CC Docket No. 78-219, 69 FCC 2d 1097, 1110 (1978).

[5] This is in contrast to the situation with certain narrowband information services. I supported modifying the AT&T Consent Decree to allow BOC entry into providing voice storage and retrieval, voice messaging and electronic mail services through the network, in part, because the BOCs are in a position to build intelligence into their systems to provide these services to average consumers.

[6] Whether a broadband *switched* network is feasible is still an open question. The switches are not now available. To provide video channel service, they will have to handle tremendous peak loads. Each half hour, they will have to accommodate the many subscribers who will be switching channels (often, many times) to choose another program.

[7] Speech to CCIA, highlights reprinted in *Broadcasting*, May 23, 1988, pp. 62-64.

[8] *See*, D. Brenner & M. Price, Cable Television 11-23, Section 11.03[2][c][3] (1986). Para. 74 of the FNOI raises the question of whether a common carrier would be *providing* cable service so as to require a franchise under 47 U.S.C. Section 621(b)(1).

[9] *See* New York Reply.

[10] *Id.* at 5.

[11] *See* Comments of Florida Public Service Commission (FPSC), October 30, 1987. It is understood this staff position was later changed by the FPSC, however.

[12] This issue has been the subject of decisions in related contexts in *NARUC v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) and *General Telephone Company of California v. FCC*, 413 F. 2d 390 (9th Cir. 1969), *cert denied*, 396 U.S. 888 (1969). However, this new integrated network context deserves reconsideration of and comment on the issue.

[13] New York reply at p.5. This, again, assumes that the 1984 Act requires a franchise. *See* discussion at fn.9, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-403

In re Applications of

TRI-STATE COMMUNITY DEVELOPMENT AND COMMUNICATIONS CORPORATION — File No. BPH-870430MR

EVANSVILLE SKYWAVE, INC. — File No. BPH-870430OK

For Construction Permit for a New FM Station on Channel 298A
Evansville, Indiana

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1989; Released: March 17, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, ESBENSEN.

1. The Review Board has under consideration an appeal filed on January 17, 1989, pursuant to Section 1.301(a) of the Commission's Rules, 47 CFR §1.301(a), by Evansville Skywave, Inc. (Skywave), and an opposition thereto filed by Tri-State Community Development and Communications Corporation (Tri-State). Skywave and Tri-State are mutually exclusive applicants seeking to establish a new FM broadcast station (Channel 298A) at Evansville, Indiana, and are currently involved in discovery proceedings prior to a comparative hearing. Skywave here appeals from a discovery ruling of presiding Administrative Law Judge Edward J. Kuhlmann (ALJ), requiring it to produce documents which Skywave asserted were "privileged." *Memorandum Opinion and Order*, FCC 89M-77, released January 11, 1989 (hereinafter *Discovery Order*).

2. On December 12, 1988, Tri-State filed with the ALJ a "First Motion for Production of Documents from Evansville Skywave, Inc." requesting a large variety of documents relevant to Skywave's application. On December 21, 1988, Skywave opposed the Tri-State motion, stating in pertinent part:

> [Skywave] objects to this request as it is both too broad and calls for the production of documents that contain information covered by the attorney-client privilege. Tri-State's request seeks " *all* documents, . . . pertaining to the formation, activities, management or control of Skywave, the prosecution of its application or the operation of the station proposed in Skywave's application," (emphasis added). As such, it is not adequately specific as to the contents of the documents sought and is therefore invalid. *Gross Telecasting, Inc.*, 49 FCC 2d 499 (Rev. Bd. 1974). Production of documents in exact accordance with the wording of this request is unduly burdensome as it would force the production of every document ever created which so much as intimates anything having to do with [Skywave's] application. More importantly, certain documents covered by this request would require the disclosure of documents memorializing conversations between [Skywave] principals and their lawyers. Such information would clearly be privileged and disclosure of this information would be grossly intrusive on the attorney-client relationship. *See Opal Chadwell*, 59 RR 2d 1115, 1116-1117 (Rev. Bd. 1986).

The ALJ, after considering these pleadings, ruled:

> Skywave's objections to request 29 are . . . overruled. It argues that the production would be burdensome and privileged; neither claim is established. Skywave states only the conclusions that it urges without any facts. It is not self-evident that production of the documents would be too burdensome; no showing has been made about how many documents are encompassed in the request. Past experience has shown that there usually are very few. The argument of privilege is unarticulated and conclusionary. An argument of privilege must list the document and explain why each document should not be produced. The showing made by Skywave does not permit any review of its claim. The Commission's rules and decisions have provided ample notice of the nature of the showing required. The documents sought in request 29 should be produced.

Discovery Order at para. 6.

3. In its appeal, Skywave reiterates its general claims of attorney-client privilege and "overbreadth." Specifically, it argues that the the Board's holding in *Metroplex Communications, Inc.*, 2 FCC Rcd 4513 (Rev. Bd. 1987), did not require "an applicant to specifically identify each document for which a privilege is claimed and establish a basis for that claim." Appeal at 2. And it contends that Request 29 "essentially asks for every single document ever produced by anybody which relates in any way to the [Skywave] application. So vast and far-reaching was the scope of this request that [Skywave] could not articulate any objection other than over-breadth and privilege, since the production of every conceivable [Skywave] document without limitation (including privileged attorney-client communications) was theoretically called for." *Id.* Tri-State responds that only Skywave's privilege claim is properly before the Board pursuant to Section 1.301(a) of the Rules, and that this claim was properly denied by the ALJ because Skywave failed to specifically identify any documents to which the alleged privilege would apply, and which would then be subject to an *in camera* inspection by the ALJ. Opposition at 2-3. Skywave's citation to the *Metroplex* case is unavailing, states Tri-State, because that ruling merely held that an applicant could wait until the time of document production to assert privilege claims. *Id.* at 3. In addition, Tri-State replies that the Board should decline to review Skywave's "overbreadth" claim because this aspect of the ALJ's ruling is not

appealable as of right, and Skywave has not sought the ALJ's leave to appeal pursuant to Section 1.301(b) of the Rules. *Id.* at 3-4.

4. We shall deny Skywave's appeal. It is elementary that a privilege claim "must list the document and explain why each document should not be produced," *Discovery Order*, *supra*, at 6; otherwise, judicial review of privilege claims would be a near impossibility. As we stated in *LNJ Communications*, 3 FCC Rcd 2745 and 4411 (Rev. Bd. 1988), "documents for which a claim of . . . attorney-client privilege are made should be identified, and the basis for the claim of privilege for each document should be specified with particularity and . . . precision." Producing the documents, together with specific objections for an *in camera* inspection by the ALJ, would have eliminated Skywave's objections to disclosure. *See LNJ Communications*, 3 FCC Rcd 5046 (Rev. Bd. 1988). Moreover, the *Metroplex* ruling, cited by Skywave, does not support its opposing position. That case simply held that, absent specific advance notice to the contrary, an applicant's failure to include a claim of privilege in its original opposition (on other grounds to a motion for production of documents) did not amount to a waiver of the privilege, 2 FCC Rcd at 4513, and that the claim may be properly tested by *in camera* inspection by the presiding forum. *See id.* at 4514; *LNJ Communications*, *supra*.[1]

5. ACCORDINGLY, IT IS ORDERED, That the appeal filed January 17, 1989 by Evansville Skywave, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTE

[1] Having dealt with its privilege claim, which Skywave concedes is the only issue "properly before the Board," Appeal at 3, we do not reach its other claims which are not authorized by 47 CFR §1.301(a)(2). The Commission, we note, has recently reemphasized that it "give[s] ALJs wide latitude to regulate the course of hearing proceedings so long as they do not act in an arbitrary or capricious manner," *Warren Price Communications, Inc.*, FCC 89-58, released February 27, 1989, at para. 6. *See also Ronald Sorenson*, 3 FCC Rcd 5022 (Rev. Bd. 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-205

In re Applications of

LOCAL MORGAN HILL RADIO ASSOCIATES	File No. BPH-870625ML
MORGAN HILL FM LIMITED PARTNERSHIP	File No. BPH-870629MX
ETHNIC RADIO OF LOS BANOS, INC.	File No. BPH-870629MZ
MORGAN HILL BROADCASTING, A California Limited Partnership	File No. BPH-870629NB
TORO BROADCASTING GENERAL PARTNERSHIP	File No. BPH-870629ND
SOUTH VALLEY BROADCASTING, A California Limited Partnership	File No. BPH-870629NH
LAURA W. HERRON and GREGORY S. GENETTI d/b/a HERRON & GENETTI	File No. BPH-870629NK
PETER MIEULI	File No. BPH-870629NN

For Construction Permit for a
New FM Station on Channel 241A
at Morgan Hill, California

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 1989; Released: March 17, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Before the Review Board is an appeal filed January 27, 1989 by Morgan Hill FM Limited Partnership (MHF) from a *Memorandum Opinion and Order* (FCC 89M-184, released January 19, 1989), of Presiding Administrative Law Judge John M. Frysiak (ALJ), dismissing with prejudice the application of MHF. Also before the Board are oppositions to MHF's appeal filed: (1) by Local Morgan Hill Radio Associates (Local), on February 2, 1989; (2) by South Valley Broadcasting (SVB), on February 6, 1989; and (3) by Ethnic Radio of Los Banos, Inc. (ERLB) ("on behalf of all the parties to the Settlement Agreement"), on February 8, 1989.

2. On December 15, 1988, all of the captioned parties (save MHF) jointly filed a Motion for Summary Decision seeking to have the application of MHF either denied or dismissed. The ALJ set forth the facts giving rise to the Motion in his *Order* (at para. 2):

> This case came on for hearing on Monday, December 12, 1988. Pursuant to the procedural schedule, each of the applicants previously had exchanged its hearing exhibits. During the course of the hearing on December 13, 1988, [MHF's] turn came up to present evidence in support of its application and pursuant to the *Hearing Designation Order* (HDO) herein. Counsel for [MHF] then announced that Mrs. Russell ([MHF's] sole general partner) decided not to pursue her integration commitment. As a result, [MHF] withdrew its previously exchanged Exhibit 3. [MHF's] counsel stated further that Mrs. Russell had decided not to appear for cross-examination. No excuse was offered for Mrs. Russell's failure to attend. She was noticed for cross-examination by five of the parties as she was the only sponsoring witness for each of [MHF's] exhibits. The admission of every one of [MHF's] exhibits was objected to. In light of Mrs. Russell's unavailability for cross examination, the objections were sustained and the exhibits rejected. [MHF] then rested its direct case presentation. Counsel for Toro motioned for immediate dismissal of the [MHF] application, but the Presiding Judge declined ruling and instead asked the parties to make a written motion for summary denial of [MHF's] application citing therein legal precedent for such action.

We here note that the "procedural schedule" referenced by the ALJ was discussed and agreed to a full *five months* prior thereto at a pre-hearing conference of July 12, 1988 (Tr. 3-10). The procedural dates were memoralized by the ALJ's *Order*, FCC 88M-2272, released July 15, 1988, which further specified that each applicant's direct case would be filed November 28, 1988.

3. In his *Order* of January 19, 1989, granting the jointly-filed Motion for Summary Decision, and dismissing the application of MHF, the ALJ held (*id.*, at paras. 3-4):

> Of course, it is axiomatic that in an adversary proceeding the testimony of a witness ought to be subject to cross-examination. The joint movants note that 47 U.S.C. §§308-309 places upon an applicant the burden of proceeding and of proof on all issues required to demonstrate its qualifications. The joint movants cite *Texan Broadcasting Co., Inc.*, FCC 81R-44, 49 RR 2d 1287, 1289-90 (Rev. Bd. 1981) for the proposition that where an applicant offers written direct testimony, but fails to produce the witness for cross-examination on such testimony, the applicant fails to meet its burden of proceeding and proof.
>
> Summary denial (or dismissal) of [MHF's] application is deemed appropriate. Although the record in the proceeding has not been closed, the time for

> [MHF] to present any further evidence for its direct case has run. Indeed, [MHF] has rested its direct case. However, its direct case is irremedially defective. [MHF's] direct case is devoid of any evidence on which findings of fact can be made. [MHF's] request for official notice of certain documents cannot be said to remedy the fatal flaw in [MHF's] direct case, *i.e.*, its failure to proceed with evidence as directed by the HDO in accordance with established procedural rules. It follows that if no findings of fact can be made on [MHF's] application pursuant to the HDO [MHF's] application must be denied or dismissed. That being the case, there is no need to examine [MHF's] motive for its conduct herein.

4. Shortly after their December 15, 1988 request for "summary decision" against MHF, all of the competing applicants (save MHF) filed (on December 19, 1988) a Joint Request for Approval of Settlement Agreement. One of the settling applicants, Local, asserts that MHF's instant appeal of its removal is inspired, in the main, by MHF's preclusion from any of the settlement proceeds.[1] The ALJ did not reach this matter; his *Order* stated only that "there is no need to examine [MHF's] motive for its conduct herein."

5. In its instant appeal MHF claims: (1) that the ALJ should not have granted summary decision because "there remain disputes about material facts involving the MHF application"; and (2) that the ALJ incorrectly determined that there are no findings of fact that can be made with respect to MHF, because the ALJ could take "official notice" of "undisputed facts" such as (a) MHF's underlying application; (b) the FAA Form 7460-1 in the MHF application; (c) its California Form LP-1 (evincing MHF's California Limited Partnership); and (d) the FAA "no hazard determination" subsequently issued (Form 7460-9).

6. In reviewing the ALJ's actions, we are constrained to summon *Hillebrand Broadcasting, Inc.*, 102 FCC 2d 804 (Rev. Bd.), *recon. denied*, 102 FCC 2d 809 (Rev. Bd. 1985), *review denied*, 1 FCC Rcd 419 (1986), *appeal dismissed mem. sub. nom. Punta Ybel Communications Ltd. v. FCC*, No. 86-1670 (D.C.Cir. Feb. 29, 1988). There, in its *Order* denying review, the Commission reflected that "there have been instances in the past where such deficiencies have not been deemed sufficient to warrant outright dismissal of an application and that applicants' temporizing activities have been indulged on occasion. Having said this, we wish to make it clear that times have changed, and so has Commission policy." The Commission went on to declare (1 FCC Rcd 419 at para. 3; emphasis added; footnotes omitted):

> For some time now there has been a growing interest in new and expanded communications services, as reflected in an increasing number of applications, and, more importantly, a demonstrated public demand for such services. Hence, we have placed a greater emphasis on our responsibility to provide service to the public in the most efficient, expeditious manner possible and on the fact that delaying the initiation of new service disserves the public interest . . . . Furthermore, we have also, among other things, made significant changes in the way the Commission conducts its comparative hearing procedures so as to achieve more efficiency and an expeditious point of finality. *See, Report and Order*, 72 FCC 2d 202 (1979). In doing so, we determined that the effective and expeditious dispatch of the Commission's business is, in itself, an integral part of the public interest. Consistent with this determination that new service should be provided to the public in the most efficient, expeditious manner possible, *ALJ's must be given broad discretion to regulate the course of multiparty comparative hearings.*

7. Under the undisputed facts of the instant proceeding, the ALJ did not abuse his discretion in dismissing MHF's application. While we have in the past remanded a proceeding where, for example, a sponsoring witness "abruptly left the witness stand without explanation" (but actually for alleged medical reasons), *GAF Broadcasting Company*, 96 FCC 2d 411 (Rev. Bd. 1984), we concurrently reaffirmed long-standing precedent for dismissal of applicants who fail to present critical sponsoring witnesses (*id.*, at 416, n. 6):

> In contrast to the present case, *compare Texan Broadcasting Co., Inc.*, 49 RR 2d 1287 (Rev. Bd. 1981), where an ALJ properly rejected a hearing exhibit because the applicant failed to produce the sponsoring witnesses who had prepared the exhibit despite notification by the other parties that the witnesses were desired for cross- examination. No explanation was offered for this failure other than that "They just can't come here at this time." Nor did the applicant request a continuance or give any indication that the witnesses could be produced at any other time. *Id.* at 1289. *See also Pan American Broadcasting Co., Inc.*, 89 FCC 2d 167, 50 RR 2d 1546 (Rev. Bd. 1982).

See also Magic City Broadcasting Corp., 35 FCC 251, 252 (Rev. Bd. 1963)(affirming dismissal where party did not proceed on designated hearing date); *Pan American Broadcasting Company, Inc.*, 89 FCC 2d 167 (Rev. Bd. 1982)(applicant dismissed for, *inter alia*, failure to produce sponsoring witness or to comply with prehearing orders); *Marlin Broadcasting of Central Florida, Inc.*, 2 FCC Rcd 2025 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 2533 (1988); *Las Americas Communications, Inc.*, 1 FCC Rcd 786, 795 (Rev. Bd. 1986).

8. In the *Hearing Designation Order* (HDO) initiating this proceeding, 3 FCC Rcd 2682 (1988), the Commission designated these applications for consolidated hearing pursuant to Section 309(e) of the Communications Act, 47 USC §309(e). That section of the Communications Act provides, *inter alia*, that any hearing held thereunder "shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant . . . ." We here agree with SVB that MHF failed to meet both statutory burdens, and "to have accepted, without reason or basis, [MHF's] unsponsored and thus uncrossexaminable [sic] evidence would have denied the competing applicants their right to a full hearing." (SVB Opposition, pg. 3.) Moreover, even if the ALJ took "official notice" of the documents MHF has submitted, such notice would establish only that the documents existed, not the truth of the facts contained therein. Thus, we

agree as well with ERLB that official notice of the MHF application would do no more than establish that MHF did, in fact, file an application.[2] Also, the bare fact that MHF's limited partnership papers were filed with the State of California would not establish, by itself, the *bona fides* of its limited partnership; the partnership documents would not establish the truth or reliability of the material representations of MHF contained therein. And, of course, the Commission's and the Board's scrutiny of the *bona fides* of such partnership and other ownership arrangements are legion. *See, e.g., Pacific Television, Ltd.*, 2 FCC Rcd 1101 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1700 (1988); *N. E. O. Broadcasting Co.*, 103 FCC 2d 1031 (Rev. Bd. 1986), *review denied*, 1 FCC Rcd 380 (1986); *Hispanic Owners, Inc.*, 99 FCC 2d 11800 (Rev. Bd. 1985), *review denied*, 104 FCC 2d 861 (1986); *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *modified*, 102 FCC 2d 288 (1985), *aff'd by judgment sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986), *cert. denied*, 107 S.Ct. 2182 (1987).

9. Moreover, MHF's allegations regarding the grant of summary decision miss the point that its application was dismissed, *simpliciter*, because of its non-prosecution.[3] It is not denied that MHF's principal witness, and its purported *sole general partner*, Martha V. Russell, failed to appear for cross-examination when MHF's application came ready for comparative hearing, notwithstanding that *she alone* was the sponsor of MHF's direct written case (exchanged November 28, 1988). Five competing applicants timely noticed Ms. Russell for cross-examination, in the conspicuous absence of whom MHF counsel attempted an eleventh-hour modification of its hearing exhibits (on the very day Ms.Russell was scheduled to testify) to delete all references to the station management proposal of the absent Ms. Russell. Lacking a sponsoring witness, MHF's entire comparative case exhibit waxed an orphan and, therefore, MHF's underlying application became an empty vessel. MHF now seeks to sail the seas of settlement with its former competitors, though bereft of cargo and rudder. Having observed the abrupt abandonment of MHF's captain (the elusive Ms. Russell), the ALJ effectively declared it a "Flying Dutchman" applicant. We will send no rescue party.

10. In sum, MHF failed in its twin burdens of proceeding and proof pursuant to 47 USC §309(e). MHF had its entitled "day in court," and it there produced neither record evidence nor sponsoring witnesses. Section 73.3568 of the Commission's Rules, 47 CFR §73.3568, provides (in pertinent part) that failure to prosecute an application will be cause for dismissal. The ALJ was correct in holding that where an applicant to a multiparty comparative proceeding has, without explanation and in contravention of the ALJ's *Order*, failed to introduce any probative evidence, but relies instead upon "official notice" of its underlying application, it has ceased to prosecute, and may be justly dismissed. Finally, we reiterate that prosecution of an application means timely compliance with all procedural and substantive rules, including, of course, orders of the presiding ALJ. *See Hillebrand Broadcasting, Inc., supra, at 419, citing Vue-Metrics, Inc.*, 69 FCC 2d 1049, 1058 (1978). *See also Warren Price Communications, Inc.*, 2 FCC Rcd 7409 (Rev. Bd. 1987), *review denied*, FCC 89-58, released February 27, 1989. We believe that the ALJ properly acted within the broad discretion afforded him to regulate complex, multiparty proceedings (eight applicants in the case at bar); and, thus, concur that dismissal of MHF's application was indeed appropriate.

11. ACCORDINGLY, IT IS ORDERED, That the Appeal of Morgan Hill FM Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Local urges that the facts in this proceeding are strikingly similar to those found in *Monts & Pritchard, Inc.*, 60 RR 2d 1469 (Rev.Bd. 1986). There, counsel for an applicant announced, in open hearing, that his client was dismissing. Following settlement by the remaining parties, the dismissing applicant sought to withdraw its motion to dismiss. In affirming the ALJ's dismissal, the Board noted (60 RR 2d at 1471):

> The statutory and regulatory purposes of . . . [47 USC §311(c)] . . . would be violated by permitting First Equimedia to continue as a party for the purpose of participating in a settlement when it was unwilling to remain in this case as a litigant.

See also Classic Vision, Inc., 1 FCC Rcd 1109 (Rev. Bd. 1986), where the Board rebuffed a dismissed applicant despite that applicant's "logy interest in its defunct application [being] reawakened by the crispy crinkle of the settlement dollars changing hands between its erstwhile competitors.

[2] While there may be some question over whether the application form itself is part of the "official record" of a comparative proceeding, *compare Voce Intersectario Verdad America, Inc.*, 100 FCC 2d 1607, 1615, n. 6, with *Dissenting Statement* at 1618, n. 2 (Rev. Bd. 1985), *recon. denied*, 102 FCC 2d 465 (Rev. Bd. 1985), it has become adjudicatory practice for applicants to reveal certain critical elements of their comparative case *(e.g.*, ownership integration, local residence, past broadcast experience, civic activities, and minority/female preferences) in their direct written case exhibits, and to disclose any sponsoring witness to be cross-examined concerning those proposals.

[3] Technically speaking, the ALJ should have limited his ruling to dismissal of MHF's application, rather than granting the motion for summary decision. Summary decision is a limited procedure designed to avoid the necessity for hearing "where there is no genuine issue as to any material fact." 47 C.F.R. 1.251(d). Here, the question was not the resolution of a substantive issue without the need for a hearing, but whether MHF should be dismissed because of its failure to prosecute its application by not presenting the sponsoring witness for cross-examination. Because all parties, including MHF, had actual notice and an opportunity to be heard on the question of MHF's dismissal, no reversible error resulted. *See Webster-Fuller Communications Associates*, 3 FCC Rcd 6967 (Rev. Bd. 1988); *recon. denied*, FCC 89R-3, released February 18, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

United Telephone System Inc.'s Permanent Cost Allocation Manuals for the Separation of Regulated and Nonregulated Costs — AAD 7-1688

MEMORANDUM OPINION AND ORDER

Adopted: March 10, 1989; Released: March 17, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In the *Joint Cost Order*,[1] the Commission required certain subject carriers, including the United Telephone System Inc. companies (collectively, United),[2] to file manuals for separating the costs of regulated telecommunications services from the costs of nonregulated activities. In response to this requirement, United initially filed six cost allocation manuals on August 28, 1987. [3] Those manuals described United's nonregulated activities, listed the activities United proposed to treat as incidental activities, and provided information on United's affiliate transactions, employee time reporting procedures, and cost apportionment methods.

2. We reviewed those manuals in the *United Order* [4] and found that certain areas of the manuals required clarification or revision. Despite these problem areas, we conditionally approved United's manuals. We determined that the manuals provided adequate assurances against the misallocation of costs and revenues between regulated and nonregulated activities to permit their implementation on January 1, 1988. We required, however, that United submit revisions addressing each of the specified problem areas. We stated that these revisions would be subject to public comment and our review, and that we would take all appropriate action, including the prescription of specific apportionment procedures, in the event we disapproved any part of the revised manuals.[5]

3. United submitted its revisions, which provide additional information regarding the problem areas identified in the *United Order*, on September 6, 1988. According to United, these revisions comply fully with that Order.[6] Additional revisions that reflect corrections to the September 6, 1988 submission were filed on November 2, 1988. No party commented on these revisions.

4. After reviewing the contents of United's revised manuals, we find, subject to certain exceptions, that they are consistent with the Commission's requirements for cost allocation manuals and properly implement the *United Order*. Before turning to these exceptions, we wish to emphasize that this Order does not discuss the many areas in which United has complied fully with Commission requirements and the *United Order*. We also wish to emphasize that the exceptions are very limited in relation to the manuals as a whole. Accordingly, we approve United's September 6, 1988 and November 2, 1988 revisions and the United of Missouri cost manual, subject to the filing of additional information and revisions specified herein. This filing shall be made no later than April 30, 1989.[7]

II. DISCUSSION

A. Overall Sufficiency of the Manual

5. Under the *Joint Cost Order*, each cost allocation manual must describe the nonregulated activities, incidental activities, affiliate transactions, employee time reporting procedures and cost apportionment methods of the telephone operating companies that will apply it. In the *United Order*, we required United to provide additional, and in certain instances, corrected information regarding each of these areas. In its revised manuals, United provides additional information regarding these areas.

B. Affiliate Transactions

6. In the *United Order*, we stated that it is not always clear from United's descriptions of its transactions whether the assets or services rules would apply. In addition, we noted that at several places it was unclear as to the meaning of the term "based on" market prices. In its revised manuals, United addresses the nature of transactions between United telephone operating companies and affiliated companies, and eliminates the term "based on." However, it is not clear whether the "market rate" meets the criteria for determining the terms of affiliate transactions because there is no definition of this term in the manuals. For transactions involving the provision of a service, we determined in the *NYNEX Compliance Order*[8] that under the affiliate transaction rules, carriers normally must record services provided by nonregulated affiliates at the affiliates' fully distributed costs.[9] We held that the only general exception to this costing methodology "permits the carrier to record an affiliates' services at the market rate 'when the same services are also provided by the affiliate to unaffiliated persons or entities.'"[10] This general exception applies only if the nonregulated affiliate also supplies the same services to nonaffiliate users in a sufficiently large number of cases to establish prevailing company prices.[11] Finally, untariffed services that carriers provide to nonregulated affiliates must also be recorded at the carriers' fully distributed costs unless the carriers provide the same services to nonaffiliated entities in a sufficiently large number of cases to establish a market rate.[12] In its further revisions, United must define the term "market rate" and must verify that each affiliate transaction involving the provision of a service that it proposes to provide at market prices meets the above criteria.

7. If the affiliate transaction involves a transfer of assets, the carrier should record it at the prevailing price held out to the general public, that is, the prevailing company price. If there is no prevailing company price, asset transfers from the affiliate to the carrier should be recorded at the lower of net book cost or fair market value, while asset transfers from the carrier to the affiliate should be recorded at the higher of net book cost or fair market value. United's definition relating to transfer of assets should conform to this definition.

III. ACCOUNT - BY - ACCOUNT ANALYSIS

A. Cost Assignment Procedures

8. *Investment in Human Capital.* In the *United Order* we indicated that none of United's manuals identify which USOA accounts include training costs and directed United to revise its manuals to show training costs as an integral part of the "overhead" accounts containing the training costs. United revised its manual to include an explanation of how its training expenses are treated. Briefly, United states that training expenses include seminars attended outside the company, tuition reimbursement, and the costs incurred to provide training classes for employees. Seminars are charged to the departmental expense accounts appropriate for the employee, and that expense is then apportioned in compliance with the allocation of the appropriate account described in the cost manuals. Tuition reimbursement and training class expenses are charged as a non-technical training expense to Account 6723, Human Resources.[13] A general allocator is used to apportion costs in Account 6723. United notes that a standard course cost, including course development, administration and classroom expense, is recorded either in regulated or nonregulated accounts and charged to departmental expense accounts or directly to nonregulated activities. It appears that United is able to keep accurate records concerning these courses, yet it has chosen a general allocator to apportion the costs in the subsidiary pool. We, therefore, direct United to explain why a general allocator is appropriate to apportion the cost pool "developing and performing non-technical training" or chose an allocator that reflects a more appropriate cost causality.

B. Specific Accounts

Accounts 5000 - 5270 - Revenue Accounts

9. For Revenue Accounts 5000 through 5270 United directly assigns revenue between regulated and nonregulated cost pools. In the *Further Order on Reconsideration*, however, we required carriers to use Account 5280, Nonregulated Revenue,[14] to record the nonregulated revenues derived from activities which share assets or revenues with regulated activities. Therefore, we require United to list such an account in its further revisions, and indicate that it will be assigned to nonregulated activities.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that the September 6, 1988 and November 2, 1988 revisions to United's Cost Allocation Manuals and United of Missouri's Cost Allocation Manual filed on November 2, 1988 ARE APPROVED, subject to the conditions stated in this Order.

11. IT IS FURTHER ORDERED that the revisions required herein shall be submitted no later than **April 30, 1989.**

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of costs of regulated telephone service from costs of nonregulated activities, *Report and Order*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on reconsideration*, 2 FCC Rcd 6283 (1987) (*Order on Reconsideration*), *modified on further reconsideration*, 3 FCC Rcd 6701 (1988) (*Further Order on Reconsideration*), *petition for review pending*, Southwestern Bell Corp. v. FCC, D.C. Circuit No 87-1764 (filed December 14, 1987).

[2] The United Tier 1 operating companies are: Carolina Telephone and Telegraph Company (United of Carolina), United Inter-Mountain Telephone Company (Inter-Mountain United), United Telephone Company of Florida (United of Florida), United Telephone Company of Indiana (United of Indiana), United Telephone Company of Missouri (United of Missouri), United Telephone Company of Ohio (United of Ohio), and United Telephone Company of Pennsylvania (United of Pennsylvania).

[3] On November 2, 1988, United filed a cost allocation manual for United of Missouri as a Tier 1 company, effective January 1, 1989. Although we did not review this manual in the *United Order*, our comments here will also apply to United of Missouri.

[4] United Telephone System Inc's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 4151 (1988) (*United Order*).

[5] *Id.* at 4151, paras. 2-3; id. at 4158, paras. 62-63.

[6] United Revised Manual, Cover Letter, dated September 6, 1988.

[7] United may defer its March 31, 1989 quarterly updates, if any, until April 30, 1989.

[8] NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 5976 (1988) (*NYNEX Compliance Order*).

[9] *Id.* at 5980, para. 20.

[10] *Id.*, *quoting* 47 C.F.R. §32.27(d).

[11] U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd at 199, paras. 33-34 (1988) (*US West Order*).

[12] *Id.* at 199, para. 33.

[13] United Revised Manuals at Section 3.3.8.

[14] *Further Order on Reconsideration*, 3 FCC Rcd at 6702, para. 12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-58

In re Applications of

MAJIKAS ENTERPRISES, LTD. (hereafter Majikas)	File No. BPH-871110MC
COLUMBIA COUNTY BROADCASTING, INC. (hereafter Columbia)	File No. BPH-871110MJ
HERITAGE BROADCASTING, INC. (hereafter Heritage)	File No. BPH-871110MR
ROBERT J. MOISEY (hereafter Moisey)	File No. BPH-871110NK

For Construction Permit
for a New FM Station
in Berwick, Pennsylvania
Channel No. 278A (103.5 MHz)

HEARING DESIGNATION ORDER

Adopted: February 14, 1989; Released: March 20, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Heritage*. On January 28, 1988 Columbia filed a motion to return Heritage's application. Columbia stated in its motion that the application of Heritage consisted of a portion of a 7.5 minute series U.S. Geological Survey map depicting the location of the transmitter site but not an entire reduced scale map. Columbia further stated that the transmitter site map submitted did not include one margin and two preprinted cross-marks, a scale of kilometers, and the year of publication and revision that were clear and legible. In addition Columbia stated that the map did not comply with the Commission's requirement in *FM Transmitter Site Map Submissions*, 1 FCC Rcd 381, 61 RR 2d 577 (1986).

3. Heritage states in its application that it will locate its antenna on the existing tower of co-owned WSQV-AM, Berwick, Pennsylvania. According to the Commission's data base, the accepted coordinates for this tower are N Latitude 41^0 04' 36" and W Longitude 76^0 15' 32". However, Heritage listed the coordinates of the tower as N Latitude 41^0 04' 45" and W Longitude 76^0 15' 35". Because Heritage clearly proposes to locate on its co-owned existing tower, and because repeated reference is made to this in the application in question, the staff could, "drawing on the application as a whole," confidently verify the transmitter location by taking official notice of the site coordinates as found in the Commission's files for WSQV. Accordingly, Heritage was correctly accepted for tender; however, Heritage shall be required to file a corrective amendment to the application with the presiding Administrative Law Judge within 30 days of the release of this Order.

4. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Heritage has not completed Item 4 correctly. Heritage's application gives a post office box number as the residence address for Peter Pastusic. Accordingly, Heritage must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the Motion to Return Application filed by Columbia IS DENIED.

9. IT IS FURTHER ORDERED, That Heritage shall submit an amendment as specified in paragraph 3 above, to the Administrative Law Judge within 30 days of the release of this order.

10. IS FURTHER ORDERED, That Heritage shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-57

In re Applications of

BARBARA M. LOWREY (hereafter "Lowrey") File No. BPH-871118MC

LARRY EDWARDS, RICHARD D. BISHOP and LYNNE R. MCCAUSLAND d/b/a BEVERLY HILLS BROADCASTING COMPANY (hereafter "BHBC") File No. BPH-871119MA

CROWN BROADCASTING, INC. (hereafter "Crown") File No. BPH-871119MC

NEW SOUTH COMMUNICATIONS, INC. (hereafter "New South") File No. BPH-871119MD

HEART OF CITRUS, INC. (hereafter "Heart") File No. BPH-871119ME

FEMALE FREQUENCY (hereafter "Female") File No. BPH-871119MF

PEPCAP LIMITED PARTNERSHIP (hereafter "Pepcap") File No. BPH-871119MH

JIM JOHNSON (hereafter "Johnson") File No. BPH-871119MI

For a Construction Permit
for a New FM Station
on Channel 246A (97.1 MHz)
in Beverly Hills, Florida

HEARING DESIGNATION ORDER

Adopted: February 15, 1989; Released: March 20, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Crown.* In its application at Section V-B, Items 7(a)(2) and (b)(2), Crown listed the tower's overall height above ground level (OHAGL) and radiation center above mean sea level (RCAMSL) as 108 meters. In the tower sketch, however, Crown listed these values as 108.5 meters and 107.3 meters, respectively. These discrepancies do not render the application unacceptable because use of either value for OHAGL, 108 meters or 108.5 meters, or 108 meters or 107.3 meters for RCAMSL, does not result in the application's proposing facilities in excess of the 3kW/100 meter HAAT maximum permitted for a Class A station under 47 C.F.R. § 73.211(b), nor do the discrepancies affect coverage or other items of the application. However, Crown will be required to submit a clarifying amendment which provides corrected values for the tower's OHAGL and RCAMSL to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. *Heart.* In its application, Heart reports that principal David S. Arthurs is presently employed by Citrus Publishing, Inc. as a member of the editorial advisory board of the *Citrus County Chronicle*, a daily newspaper serving the community of license. The above principal further affirms that he will terminate his position with the newspaper should the instant application be granted. Accordingly, an appropriate condition will be specified below.

4. *Lowrey.* In its application, Lowrey requested an overall height AGL of 111 meters (including obstruction lighting) and 120 meters AMSL. These requested heights do not agree, however, with the heights of 109.7 meters AGL and 118.9 meters AMSL that were filed with the Federal Aviation Administration (FAA). Accordingly, due to this discrepancy, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Lowrey	October 14, 1988
BHBC	January 9, 1989
Crown	September 13, 1988; October 25, 1988
Pepcap	May 19, 1988
Johnson	June 10, 1988; September 26, 1988

6. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Crown and New South have not completed Item 4 correctly. Furthermore, New South's application gives a post office box number as the residence address for principals Frank E. Holladay, Ann S. Holladay, and Kenneth R. Rainey. Accordingly, Crown and New South must submit amendments which give all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

7. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, to-

gether with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Lowrey would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That in the the event of a grant of Heart's application, the construction permit shall be conditioned as follows:

Prior to the commencement of program test authorization, permittee shall certify to the Commission that David S. Arthurs has terminated his position with Citrus Publishing, Inc., publishers of the *Citrus County Chronicle*.

11. IT IS FURTHER ORDERED, That, in accordance with paragraph 2 hereinabove, Crown shall submit a clarifying amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That Crown and New South shall submit amendments which contain the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

13. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Lowrey, BHCB, Crown, Pepcap and Johnson ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2), and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-118

In the Matter of

Revision of Section 73.3573(a)(1)
of the Commission's Rules Concerning
the Lower Classification of an
FM Allotment

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 23, 1989; Released: March 17, 1989

By the Commission:

1. The Commission has before it the *Notice of Proposed Rule Making*, in this proceeding, 3 FCC Rcd 2192 (1988). The *Notice* proposed to allow applicants, permittees, or licensees to downgrade the class of an FM allotment by merely filing an application, rather than requiring a rule making proceeding before the downgrade application is considered.[1] In response to the *Notice*, we received comments from Martin L. Hensley, Capitol Broadcasting Corporation and the National Association of Broadcasters. By this decision we are implementing the proposal set forth in the *Notice*.

BACKGROUND

2. Currently, in order to reclassify an existing FM allotment to a higher or lower class, Section 73.3573(a)(1) of the Rules requires that the FM Table of Allotments first be amended. A party initiates such an amendment by filing a petition for rule making. A notice of proposed rule making then proposes the higher or lower class allotment and solicits comments and reply comments. After a determination that grant of the proposal would serve the public interest, a report and order is issued amending the Table of Allotments accordingly. Approximately one year normally elapses between the time the petition is filed and the issuance of a report and order. Thereafter, a party wishing to operate facilities on the new channel class must file an application.[2] The *Notice* proposed the elimination of the rule making requirement as a condition precedent to downgrading the class of an allotment.

3. Downgrading can be desirable in the context of either a vacant allotment or an existing FM station. For example, both existing stations seeking to relocate their transmitter sites and applicants filing for a new FM station must meet the separation criteria set forth in our Rules. For various reasons, such as the inability to meet FAA requirements, zoning restrictions, or the desire to use an existing structure at a site not complying with the separation criteria, an applicant may not be able to secure an acceptable site. If the applicant could specify a lower class of station (B1, C1, C2 or A) with reduced separation requirements, it may have a greater selection of potential sites from which to choose. With regard to existing structures, occasionally an applicant is unable to attain the prescribed minimum antenna height for the particular class. Once again, specifying a lower class of station with a lower prescribed minimum antenna height may be a solution. Further, an applicant might also determine that the higher class is either unnecessary or not economically viable because of the increased costs of constructing a higher antenna tower or operating with higher power.

4. The comments we received were favorable. In addition to supporting the Commission's proposal, Martin L. Hensley requests that parties with rule making petitions on file be "grandfathered" and that a "freeze" be "imposed on all allotments, except Docket 80-90 frequencies, until this matter before the Commission is decided." Capitol Broadcasting Corporation (Capitol) supports the Commission's proposal. Also, Capitol refers to a potential situation in which a licensee of an existing station files an application specifying facilities less than the prescribed minimum in either antenna height or power while specifying the desired higher class of channel in another part of the application form. Capitol requests that these stations not be presumed to have requested a downgrade. The National Association of Broadcasters (NAB) also filed comments. In its comments, the NAB urges that the procedural safeguard of public participation currently available to interested parties in the rule making process also be available under the proposed procedure, either by allowing petitions to deny or informal objections against downgrade applications. In addition, the NAB urges that in situations involving a prevailing allotment in a comparative rule making proceeding, a party be prevented from proposing a downgraded allotment in a subsequently filed application. After careful consideration of these comments, we are going forward with the proposed revision of Section 73.3573(a)(1) of the Rules.[3] We discuss the revised procedure in conjunction with these comments below.

VACANT ALLOTMENTS

5. Under existing procedures, FM channels are allotted to communities in rule making proceedings in which both the channel number and class are established. The report and order in the rule making proceeding normally establishes an application filing window for the new allotment. If no applications are filed, or if applications are filed but all are subsequently dismissed or denied, the allotment becomes available on a first come/first served basis. Parties filing for a vacant FM allotment during the application filing window or after the application filing window closes may propose only that class of channel specified in the Table of Allotments. A party may file an application proposing a downgraded channel only after a subsequent rule making proceeding downgrading the allotment.

6. Under our new procedure, an applicant filing for a new FM allotment during an application filing window must specify the class of channel prescibed in the Table of Allotments. In the event the channel becomes subject to processing on a first-come/first served basis, an applicant may specify the lower class channel.

7. Interested parties, including the public and parties in the earlier rule making proceeding which allotted the channel, will be able to participate in the application

process and raise the same arguments and concerns which they are now able to advance in a rule making proceeding. Instead of filing comments and reply comments in the rule making proceeding, the interested party may file a petition to deny or an informal objection directed against the application for a new station specifying a downgraded class. All substantial and material issues will be considered in the context of that application.

EXISTING AUTHORIZATIONS

8. Under existing procedures, licensees or permittees must first file a petition for rule making to downgrade the channel class of the allotment on which they are authorized. After the rule making proceeding, the licensee or permittee files a minor change application to modify facilities. The modification of facilities can involve a reduction in power, a reduction in antenna height, and/or a change in transmitter site.

9. Under the new procedures, the licensee or permittee will merely file a minor change application to modify facilities. Interested parties may file an informal objection directed against the minor change application to downgrade the allotment of an existing station. A reduction in power or antenna height by itself does not have any preclusive effect with respect to other applications or rule making petitions. On the other hand, a change in transmitter site could conceivably involve a conflict with a pending application or rule making petition. These conflicts and any other matter which may arise in these modification applications will be processed in accordance with existing policies and procedures.[4] We do not perceive any public interest benefit in first having a rule making proceeding to downgrade the allotment because of either a reduction in facilities or a change in transmitter site. All matters, including potential loss of service to underserved areas, can be considered in either the rule making or the application context. The public and the station will benefit from the expedited review and implementation of new service provided by our revised procedure. Our revised procedure trims approximately one year from the time needed to implement a proposed downgrade. In turn, this will also expedite consideration of other proposals made possible by the downgrading of an existing allotment and the reduced separation requirements.

OTHER MATTERS

10. The NAB expresses concern about the filing of an application proposing to downgrade a vacant allotment. Specifically, this concern involves a situation where mutually exclusive petitions for rule making are filed proposing FM channel allotments to different communities. A petitioner may propose a higher class channel in the comparative rule making proceeding and then, once the channel has been allotted, file an application proposing a downgraded channel. This would occur in the context of an application for a construction permit for a new station filed on a first-come/first served basis after the filing window closes, or, if an application is filed during the application filing window and granted, in an application for modification of construction permit filed after the grant. We addressed this concern in paragraph 10 of the *Notice*.

11. We continue to believe that such a practice could be unfair to other parties and communities in the rule making proceeding. This is especially true if, by proposing the higher class channel in the rule making proceeding, a party obtains a comparative advantage. However, we do not perceive the need to adopt an absolute proscription on the filing of such applications as suggested by the NAB. Instead, we will reserve the right to take appropriate action in such situations on a case-by-case basis. There are two reasons for this decision. First, based on our own experience and review of the comments, we do not believe that this will be a pervasive problem requiring a specific rule. In fact, it is our experience that applicants are normally interested in upgrading their allotment and not operating with reduced facilities. *See e.g. Modification of FM and TV Station Licenses*, 98 FCC 2d 916 (1984). Second, there may be unforeseen or other public interest reasons for a subsequent application proposing a downgraded allotment. We believe that it is more conducive to the efficient transaction of Commission business to consider these reasons in the context of making our public interest finding while processing the application. However, a proponent of a downgrade who makes the request before or during the first year of station operation and who was the prevailing petitioner in a contested allotment proceeding as a direct result of the class of channel proposed will be expected to make a compelling showing that the downgrade would serve the public interest.

12. We also have an analogous concern in situations where the successful applicant from among two or more mutually exclusive applicants for an allotment has obtained a construction permit as a result of a decisive Section 307(b) preference awarded in a comparative licensing proceeding. Accordingly, a proponent of a downgrade who makes the request before or during the first year of station operation and who received a dispositive comparative preference in a licensing proceeding will be expected, if the reason for the preference is obviated by the downgrade, to make a compelling showing that the downgrade would serve the public interest.

13. We do not perceive any public interest reason to "grandfather" existing petitioners as suggested by Martin L. Hensley. We see no reason to require existing stations with pending petitions to wait longer to file an application for a downgrade than stations without petitions on file. However, Mr. Hensley's proposal raises the question of transition procedures to the new system. In the event that a petition for rule making proposing a downgrade in the channel class of an existing station is pending on the effective date of the revised rules, the petition for rule making will be dismissed and the petitioner may immediately file the appropriate application. We will not accept downgrade applications prior to the effective date of the new procedure. As for the situation envisioned by Capitol Broadcasting Corporation with respect to an "automatic" downgrading by an applicant inadvertently proposing facilities below the prescribed minimum antenna height or power,[5] we note that the application form clearly requires the applicant to specify the class of channel being proposed. In the event this type of inconsistency should occur under the present rules, the application will be subject to dismissal.

14. In regard to a vacant allotment, we will amend the Table of FM Allotments upon grant of the construction permit specifying the downgraded class. Similarly, we will also amend the Table upon grant of a construction permit

downgrading the class of an outstanding construction permit for a new FM station. In both cases, once this construction permit is granted, we shall no longer protect the original allotment class at the reference point. Rather, we shall process other applications and rule making petitions based upon the downgraded channel. *See* Section 73.208(b)(1) and (2) of the Commission's Rules. Should the construction permit be revoked at a later date, the downgraded channel will be retained in the Table. On the other hand, after grant of a construction permit to modify the facilities of an *existing* FM authorization to a lower class, we will continue to protect the authorized facilities until the modified facilities are licensed. The construction permit for the modified facilities will also be protected as currently done in cases where a site change is granted.[6] Upon licensing, we will amend the Table accordingly.

15. Pursuant to the Regulatory Flexibility Act of 1980, our final analysis is as follows:

I. Need for and Purpose of the Rule

1. We have concluded that the present rule making and application procedure are an unnecessary burden on the applicant and delay the processing of the proposal. This also delays new service to the public. All relevant public interest matters can be considered in an application procedure.

II. Summary of issues raised by public comments to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result.

1. Comments contended that processing expediency and easing the burden on applicants should not override the rights of interested parties wishing to bring certain matters to the attention of the Commission. As set forth above, we find that public participation will not be curtailed by the changes and that the benefits of the changes in terms of expedited processing are substantial. The only change is that public participation will take place in an application context rather than a rule making proceeding.

III. Significant Alternatives Considered and Rejected

1. The alternative rejected was to retain the rule making and application procedure. Any such procedure would continue to burden the applicant and delay processing. Moreover, the revised procedures will not preclude interest parties from having relevant concerns considered by the Commission.

16. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to contain no new or modified form, information collection, and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

17. Authority for adoption of the rules contained herein is contained in Sections 4(i) and 303 of the Communications Act of 1934 as amended.

18. Accordingly, IT IS ORDERED, That Sections 73.3573(a)(i) and 73.203 of the Commission's Rules ARE AMENDED as set forth in Appendix A below, effective **May 1, 1989.**

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 C.F.R. Part 73 of the Federal Communications Rules and Regulations is amended as follows:

1. Section 73.203 is revised to read as follows:

Section 73.203 Availability of channels

(a) Except as provided for in paragraph (b) of this section, applications may be filed to construct FM broadcast stations only at the communities and on the channels and classes contained in the FM Table of Allotments (Section 73.202(b)). Applications that fail to comply with this requirement, whether or not accompanied by a petition to amend the Table, will not be accepted for tender.

(b) In the event a channel becomes available for application on a first-come/first-served basis, an applicant may propose a lower class channel. Applications for the modification of an existing FM broadcast station may also propose a lower class of channel. In both cases, the applicant need not file a petition for rule making to amend the Table of FM Allotments (Section 73.202(b)) to specify the lower channel class.

2. In Section 73.3573, paragraph (a)(1) is revised to read as follows:

Section 73.3573 Processing of FM broadcast and FM translator station applications.

(a) * * *

(1) In the first group are applications for new stations or for major changes in the facilities of authorized stations. A major change for FM stations authorized under this part is any change in frequency or community of license which is in accord with a present allotment contained in the Table of Allotments (Section 73.202(b)). Other requests for change in frequency or community of license for FM stations must first be submitted in the form of a petition for rule making to amend the Table of Allotments. In the case of FM translator stations authorized under Part 74, it is any change in frequency (output channel), or authorized principal community or area. For noncommercial educational FM stations, a major change is any change in frequency or community of license or any change in power or antenna location or height above average terrain (or combination thereof) which would result in a change of 50% or more in the area within the station's predicted 1 mV/m filed strength contour. (A change in area is defined as the sum of the area gained and the area lost as a percentage of the original area). However, the FCC may within 15 days after the acceptance of any other application for modifica-

tion of facilities, advise the applicant that such application is considered to be one for a major change and therefore subject to the provisions of Section 73.3580 and 1.1111 pertaining to major changes. Proposals to upgrade the class of an FM broadcast station must first be submitted as petitions for rule making to amend the Table of Allotments. After the initial filing window closes for a vacant FM allotment, an applicant may propose a downgraded class in an application for a new FM broadcast station. A licensee or permittees may seek the downgrading in class of its existing FM broadcast station by filing a minor change application.

* * * * *

FOOTNOTES

[1] Prior to 1984, Section 73.206 of the Rules provided for only two classes of channels in each of the three zones of the country (Zone I or IA - Class A or B; Zone II - Class A or C). In BC Docket No. 80-90, we created three additional classes of channels (Class B1, Class C1 and Class C2) which operate with lesser power and/or antenna height and require reduced minimum separation standards. *Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Assignments*, 94 FCC 2d 152 (1983), *recon. granted in part and denied in part*, 97 FCC 2d 279 (1984).

[2] Where the downgrade is made to an allotment for which there is a licensee or permittee, the only eligible applicant for the downgraded allotment is the licensee or permittee.

[3] In revising Section 73.3573(a)(1), we will also be revising the parallel provision in Section 73.203 of the Rules.

[4] *See e.g., Amendment of Section 73.3572 and 73.3573 Relating to Processing FM and TV Broadcast Applications*, 50 Fed. Reg. 19936, published May 13, 1985.

[5] An example would be an applicant specifying Class C on the application form while inadvertently proposing an antenna height below the prescribed 300-meter minimum. Capitol Broadcasting Corporation appears to be concerned with the potential for this application to be granted and the allotment downgraded to Class C1.

[6] Any subsequent application or petition for rule making must meet the prescibed minimum spacing requirements with respect to the geographic coordinates and channel class of that construction permit.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Letter from Univision, Inc.
Concerning the Applicability
of 47 C.F.R. §73.658(j) and
47 C.F.R. §73.658(k)

MEMORANDUM OPINION AND ORDER

Adopted: January 30, 1989; Released: March 17, 1989

By the Commission:

INTRODUCTION

1. Before the Commission for consideration is a letter dated July 2, 1988, from Univision, Inc. (Univision) asserting that the prime time access and financial interest and syndication rules do not apply to Univision. The prime time access rule prohibits network affiliates in the top 50 television markets from devoting more than three hours of the four hour prime time period to the broadcast of network or off-network programming, with certain limited exceptions not relevant here.[1] The financial interest rule forbids networks to obtain any financial or proprietary rights in the exhibition, distribution, or use of programs produced by others, except for the exclusive right to network distribution in the United States.[2] The syndication rule forbids networks to engage in domestic syndication of any program or foreign syndication of independently produced programs.[3] Under 47 CFR §73.658(j)(4), these rules become applicable to an entity when it offers an interconnected program service on a regular basis for at least 15 hours per week to at least 25 affiliated television licensees in 10 or more states.[4]

2. Univision currently provides at least 84 hours of weekly programming to 28 stations in 14 different states. Thus, arguably, it has reached the "15-25-10" threshold levels at which the prime time access, financial interest, and syndication rules become relevant to a network under §73.658(j)(4). However, we have carefully reviewed Univision's letter, initial and reply comments submitted in response to a June 22, 1988, Public Notice of the letter, and the relevant law. On the basis of this review, we conclude that Univision is not yet within the ambit of the relevant rules because the rules do not apply to stations in the low power television service (LPTV) and therefore low power stations should not be counted in determining whether a network has reached the §73.658(j)(4) thresholds. In Univision's case, 15 of 28 affiliates are in the low power service. When these low power stations are excluded in calculating the number of affiliates that Univision has for purposes of §73.658(j)(4), Univision is obviously well below the 25 station threshold level. We therefore are in accord with Univision's position that, as it is currently constituted, Univision is not subject to the financial interest or syndication rules nor are its affiliates subject to the prime time access rule.

BACKGROUND

3. *Univision's Letter.* On July 2, 1987, Univision filed a letter that describes Univision operations and "apprises" the Commission of Univision's conclusion that neither the prime time access rule nor the financial interest and syndication rules apply to Univision.[5] Univision bases this conclusion on several theories. First, Univision argues that it should not be subject to the prime time access rule or financial interest and syndication rules because those rules were intended to apply only to ABC, CBS, and NBC. In support of this contention, Univision cites the *Notice of Proposed Rule Making* [6] concerning the rules, the *Order* [7] adopting the rules, the *Reconsideration Order*,[8] and the 1980 *Tentative Decision* to modify the rules. In addition it cites several other Commission decisions concerning the rules in which the Commission refers repeatedly to the three national network corporations.[9]

4. Univision also argues that the language of §73.658(j)(4) makes the relevant rules inapplicable to Univision at this time. That section, as explained in paragraph 1 *supra*, states that the prime time access and financial interest and syndication rules apply to any entity that offers regular interconnected program service of at least 15 hours to 25 *licensees* in 10 states (emphasis added). Univision explains that, in its case, 18 of its 28 affiliates are licensed to four licensees, so Univision has only a total of 14 "affiliated licensees." Consequently, Univision argues that it has not yet reached the threshold number of affiliates that triggers the rules.

5. Finally, Univision points out that it serves a total of 15 low power stations, 10 of which originate programming and 5 of which are translators.[10] Translators rebroadcast programming of their parent stations and have only a minimal capacity to originate local programming.[11] Therefore, Univision argues, the prime time access rule, which presumes a licensee program selection process that does not exist for translators, is basically irrelevant to these stations. As for program-originating low power stations, Univision points out that in its 1982 *Report and Order* on the low power service, the Commission expressed the intent that low power stations should be subject to a minimum of program content regulation and did not include the prime time access rule on the list of regulations that *do* apply. *Report and Order* in BC Docket No. 78-253, 51 RR2d 476,484 (1982) (hereinafter "*LPTV Report and Order*"). Since 15 of Univision's 28 "affiliated stations" are low power stations that, Univision believes, should not be counted in determining whether a network has reached the threshold levels at which the rules become relevant under §73.658(j)(4), Univision concludes that the prime time access rule does not apply to it. Moreover, according to Univision, since §73.658(j)(4) threshold levels define the applicability not only of the prime time access rule but also of the financial interest and syndication rules, "it must be concluded that these rules also do not apply [to stations in the low power service.]" Indeed, application of any of the three rules to the low power service, Univision says, would be contrary to the public interest because hybrid full service/LPTV networks that are hovering at or just above the threshold level of the "affiliate" component of the §73.658(j)(4) definition will drop or refuse to add LPTV affiliates in order to comply with the rules' limitations. Such results will undermine the considerable public benefit achieved by the LPTV service.

6. *Comments of Other Parties*. Of the parties filing comments in response to the June 22, 1988, Public Notice of Univision's letter, four parties substantively address the issues raised in the letter. These parties are the National Broadcasting Company, Inc. (NBC), Media Access Project (MAP) (filing on behalf of the Telecommunications Research and Action Center and National Association for Better Broadcasting), Hispanic Independent Producers for Television, and Hernan de Beky Betancourt.[12]

7. NBC urges that finding the prime time access rule or financial interest and syndication rules inapplicable to Univision would be contrary to the plain language of those rules. NBC points out that, in its 1970 reconsideration of the rules, the Commission considered defining "network" to include only the three national networks and thus applying the rules only to those networks. Ultimately, however, it declined to do so. Rather, in §73.658(j)(4) it established an objective definition of what constitutes a "major television network" and built into *that* definition a "grace period" for emerging networks to develop into more mature networks. After that grace period, NBC argues, the rules apply. Univision, according to NBC, has reached the thresholds set forth in §73.658(j)(4) that mark the end of the grace period and thus must comply with the restrictions of the prime time access, financial interest, and syndication rules. Regarding Univision's argument that "licensees," not "stations," should be counted in determining "affiliates" under §73.658(j)(4), NBC points out that, under Univision's interpretation, a network could have a very large number of affiliates and still escape the rules because the Commission's local and national multiple ownership rules, subject to certain limitations, permit one licensee to own numerous stations. Concerning Univision's argument that its translator and program-originating low power stations should not be included in counting its "affiliates" for purposes of §73.658(j)(4), NBC refers to §74.780, which lists the rules applicable to stations in the low power service. That list includes §73.658 generally and does not exclude subsections (j) and (k), which contain the financial interest and syndication rules and the prime time access rule, respectively.[13] NBC claims this fact implies that the rules at issue must, therefore, apply to stations in the low power service.

8. MAP argues that Univision's letter is an attempt to "privatize" the Commission's decision making function and that the Commission's silence to date on the issues raised by the letter indicates acquiescence to "questionable legal theories."[14] MAP, like NBC, also argues that the plain language of the definition of "network" as it applies to the prime time access rule and financial interest and syndication rules requires application of those rules to Univision.

9. Both Hispanic Independent Producers for Television and Hernan de Beky Betancourt argue that the relevant network restrictions should be applied to Univision to rein in what they view as Univision's monopoly power over the Spanish-language television market. Both commenters are producers of Spanish-language programming. They contend that Univision, the primary Spanish-language television organization in the United States, accepts Spanish-language programming only on the basis of Univision's self-interest. They indicate that much of this programming is provided by program suppliers outside of the United States, to the detriment of program producers in the United States and to the detriment of the Hispanic population in the United States. This population, the commenters argue, needs Spanish-language programming produced in the United States and more likely to emphasize domestic issues, not foreign issues.

10. *Univision's Reply Comments*. Univision's reply comments reiterate its earlier arguments and address several points raised in comments filed by other parties, including NBC's argument concerning 47 CFR §74.780. Univision contends that the reference in §74.780 was intended to include only subsections of §73.658 that govern network affiliation agreements and points to language in the *LPTV Report and Order* to support this view. Specifically, Univision points out that NBC ignores the Commission's clear intent, reflected in the *LPTV Report and Order*, not to burden the low power television service with program content regulations and the omission of any discussion in that document of applying the prime time access and related rules to this service.

DISCUSSION

11. We find merit in Univision's argument that the prime time access rule and the financial interest and syndication rules should not apply to its currently constituted operations, on the grounds that, excluding its low power affiliates, it fails to reach the 25-station threshold that triggers those rules. As stated above, Univision argues that the Commission did not intend that low power stations be subject to these rules. For guidance on this issue, we turn to the Commission's 1982 *LPTV Report and Order* authorizing the low power television service and outlining the various regulations and procedures that are applicable to the service.[15] In that *Order*, the Commission recognized that technical and operational limitations of low power stations "inform different sets of regulatory decisions [than are applicable to full service stations]." *Id.* at 484. Specifically, the Commission noted that low power stations enjoy only a secondary status; *i.e.*, they operate on a non-interfering basis and are required to relinquish their frequency if a full-service station wishes to commence operations using the same channel. Furthermore, low power stations have small service areas and, in turn, generate lower revenues from advertising and other sources than full-service stations do. Because of these distinctive limitations, the Commission was concerned that applying certain of the rules and policies governing full-service stations to low power television might threaten the viability of that service in general, and, accordingly, the Commission undertook to minimize, wherever possible, regulations that might hamper its growth and development. *Id.* at 517. Thus, for example, the Commission relaxed signal quality standards for the service, eliminated requirements concerning hours of operation and coverage areas, and eliminated most ownership restrictions, including the duopoly, one-to-a-market, cable cross ownership, and multiple ownership rules.

12. Of particular importance here, the Commission also minimized program-related rules for the low power service. It pointed out that such rules and policies generally proceed from the assumption that broadcast stations serve the public when they meet the programming needs and interests of the diverse elements of the community of license. It indicated, however, that, in light of the nature of the low power service, "a concern that all elements of the larger community be provided with program service is not present." *Id.* at 485. The Commission reasoned that

program-related regulations were unnecessary to insure that LPTV stations satisfy the programming needs of its smaller audiences in discrete small service areas, since such stations would have incentives to do so anyway to increase their audience and, consequently, their profitability. *Id.* at 485, 518. The Commission therefore exempted LPTV stations from most of the program related regulations applicable to full service stations. The program related regulations that the *LPTV Report and Order* specifically retained for the low power service were the statutory requirements that program-originating stations make station identification announcements during periods of program origination and that all low power programming comply with the definition of "broadcast" in the Communications Act of 1934, as well as statutory limitations on broadcast licensees, including, for example, prohibitions on the broadcast of obscene material, plugola, payola, and lotteries. *Id.* at 519.

13. The prime time access, financial interest, and syndication rules appear to fall within that category of rules that the above referenced discussion indicated would be inappropriate for application to the low power television service. This view is reinforced by what would appear to be the patent impossibility of imposing the program origination obligation inherent in the prime time access rule on translator stations that are by definition not engaged in this kind of program selection but rather are largely confined to broadcasting the same programming as the parent station from which their programming is received. Nothing in the *LPTV Report and Order* adopting the low power television rules suggests any contrary Commission intent. Further, there is nothing in the proceedings adopting, or leading up to the adoption of the prime time access, financial interest, or syndication rules that indicates an intent to apply such rules to translator type stations.[16] In this regard, we note that the Commission has specifically stated that the purpose of the §73.658(j)(4) definition is to distinguish "major" networks from "regional" or "lesser" networks so that the restrictions of the prime time access rule and the financial interest and syndication rules limit anticompetitive behavior by presumably powerful organizations without restricting organizations that have no such power. *See Christian Broadcasting Network, Inc.*, 87 FCC 2d 1076 (1981). Application of the rules to a network composed of low power and translator stations would not be consistent with this effort to limit the coverage of the rules to major networks.

14. It is true, as NBC points out, that 47 CFR §74.780, which lists rules applicable to stations in the low power service, includes §73.658, the section containing the prime time access rule and the financial interest and syndication rules. However, we agree with Univision that the inclusion of this section on the list actually refers to those subsections of §73.658 that concern the contractual relationships of stations in the low power service, not those that concern programming practices. This interpretation is consistent with the Commission's emphasis in the *LPTV Report and Order* on the fact that application of program-related regulations to stations in the low power service is, in general, inappropriate and unnecessary.[17] Moreover, we note that, when the Commission discussed the applicability of §73.658 to low power stations in the *LPTV Report and Order*, it did so only in terms of the stations' contractual relations:

> In the interest of ensuring even-handed treatment of all network affiliates, full service or low power, we are requiring that any affiliation agreements between low power stations and networks will be subject to the same regulations as full service station affiliation agreements, see §§73.658 and 73.3613 of the Commission's Rules.

LPTV Report and Order at 521.

15. Apart from our opinion that, in formally initiating the LPTV service in 1982, the Commission did not intend that nascent service to be burdened by the prime time access and financial interest and syndication rules, we are unable to conclude that such an application now is required to achieve the public interest objectives which led to the adoption of the rules. As discussed above, low power stations are secondary stations that may be required to alter facilities or cease operations at any time. The majority of them are in rural areas with scattered populations and even those stations in urban areas reach only a limited audience. A network comprised primarily or even partially of such stations is not in a position to influence the national program supply market in the way those organizations which were the predicate for the rules, were believed able to do.[18] Application of the prime time access rules to translator stations would have a major disruptive impact on the operation of those stations.

16. We also believe that application of the rules to the low power service could actually be an unwarranted barrier to the development of the service. As Univision points out, the result of finding that the rules apply to low power stations and that low power stations must therefore be counted in calculating the number of affiliates a network has for purposes of §73.658(j)(4) is that groups of affiliated stations consisting of both low power and full service stations which are hovering at or just above the 25-station threshold will drop LPTV affiliates in order to escape the burdens of compliance with these rules. This result would clearly be contrary to our goal of promoting the growth and development of low power television as a new, alternative broadcasting service and would generate no countervailing benefits for the public.

CONCLUSION

17. In sum, on the basis of the above discussion, it is our opinion that when the Commission in 1982 exempted low power television stations from so-called "program-related" regulations, it intended to include the prime time access and financial interest and syndication rules within that category. Moreover, we do not believe that application of the rules to the LPTV service at this time would serve any useful purpose and might well do harm to that important service. Consequently, we conclude that low power stations should not be counted in determining whether a collection of affiliated television stations has reached the 25-station threshold contained in the network definition set forth in §73.658(j)(4). In the specific case of Univision, omitting stations in the low power service from Univision's system of affiliates for purposes of §73.658(j)(4) removes Univision from that definition since, without its low power stations, Univision has only 13 affiliates, twelve stations less than the 25-station threshold.[19]

18. Accordingly, we conclude that Univision, as presently constituted, is not yet within the scope of the prime time access rule or the financial interest and syndication rules.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 47 CFR §73.658(k).

[2] 47 CFR §73.658(j)(1)(ii).

[3] 47 CFR §73.658(j)(1)(i).

[4] Specifically, §73.658(j)(4) defines a network, for purposes of the prime time access, financial interest, and syndication rules, as "an entity which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states; and/or any person, entity, or corporation controlling, controlled by or under common control with such person, entity, or corporation."

[5] Although not styled as such, we are treating Univision's letter as a request for a declaratory ruling since the letter essentially asks us for a legal opinion as to whether certain Commission rules apply to Univision. For future reference, though, we caution that, where, as here, the Commission has received notification of a licensee's interpretation of a Commission rule or policy, the Commission's silence or inaction with respect to that notification should not be read to suggest the Commission's approval of, or agreement with, the licensee's interpretation. Any assumption in that regard on the part of the licensee would be unwarranted and unwise. In the event a licensee is unclear about the applicability of a Commission rule or policy, the licensee may always file with the Commission a request for a declaratory ruling or, in the alternative, a request for a waiver of the regulation in question. *See* 47 C.F.R. §1.2 and 1.3, respectively.

[6] *Notice of Proposed Rule Making* in Docket No. 12782, 4 RR 2d 1589 (1965).

[7] *Report and Order* in Docket No. 12782, 23 FCC 2d 382 (1970).

[8] *Reconsideration Order* in Docket No. 12782, 25 FCC 2d 318 (1970).

[9] *See, e.g., Christian Broadcasting Network*, 87 FCC 2d 1076 (1981).

[10] A television translator station is a low-power broadcast station that receives a television signal on one channel, amplifies it, and simultaneously retransmits it on another channel. Translators thereby provide a means by which the signals of other broadcast stations may be retransmitted to areas in which direct reception of those signals is unsatisfactory due to distance or terrain barriers. Program-originating low power stations, by contrast, originate programming by broadcasting locally, broadcasting a network feed, offering a subscription service, etc. Stations in both the translator and low power television services are secondary and are thus subject to displacement by full power stations subsequently authorized on the same frequencies.

[11] Translators functioning unattended may originate only emergency warnings and 30 second segments each hour during which they can seek or acknowledge financial support. *See Report and Order* in BC Docket No 78-252, 77 FCC 2d 1006 (1980).

[12] Two other commenters, Group W and CBS, Inc., indicate that they take no position on the Univision request but note that Univision operations are different from those of the three traditional networks and from those of Fox Broadcasting Company. One other commenter, Telemundo Group, Inc. (Telemundo), requests that the Commission prospectively extend to Telemundo any relief from the relevant rules that it grants Univision. Telemundo maintains that since it competes with Univision in the provision of Spanish-language programming to stations across the United States, fairness and consistency mandate similar treatment for Univision and Telemundo.

[13] Section 73.658 contains most of the Commission's regulations on network-affiliate relationships and network-program supplier relationships.

[14] *See* note 5 *supra*.

[15] As explained in notes 10 and 11 *supra*, translator stations are low power stations that, with very limited exceptions, merely retransmit the signal of other stations. The translator service was authorized in 1956. However, because the 1982 *Order* permitted far greater programming flexibility than ever before for low power stations, the Commission regarded the 1982 *Order* as essentially, "inaugurating a new service." *LPTV Report and Order* at 480.

[16] *See, e.g., Report and Order* in Docket 19622, 50 FCC 2d (1975).

[17] We note that in the *LPTV Report and Order*, the Commission clearly envisioned networking for low power stations. Specifically, it discussed methods by which "program-oriented networking" could occur for low power stations, including, for example, through common ownership of numerous stations or through "affiliation for program distribution or syndication." *Id.* at 515. In the same discussion, however, the Commission did not discuss the desirability of applying to the service any rules that generally govern network-affiliate relationships, except those concerning contractual relationships. *See* paragraph 14 *supra*.

[18] Hispanic Independent Producers for Television and Hernan de Beky Betancourt argue that, at least vis-a-vis the Spanish-language programming market, Univision does have monopolistic power. They also argue that Univision has unfairly favored Spanish-language programming produced outside the United States to the detriment of producers based in the United States, including themselves. These points appear to address the question of whether a unique set of rules would be appropriate for the Spanish-language television market rather than the objectives and coverage of the existing rules. We note, however, that Univision has a strong competitor in the Spanish-language programming market, namely Telemundo Group, Inc. *See* note 12, *supra*. We also note that Univision's affiliates have the freedom, under their affiliation agreements, to reject Univision programming in favor of other programming. *See* Univision reply comments at 5, quoting relevant contract provisions. The accusation that Univision has rejected programming proposals made by the commenters in favor of programming produced outside the United States, is also a matter not addressed by the rules under discussion here and therefore not appropriately addressed in the context of this *Opinion and Order*.

[19] Telemundo requests that the Commission extend to it any relief from the relevant rules that is extended to Univision. *See* note 12 *supra*. To the extent that Telemundo serves stations in

the low power service, it may, on the basis of this *Order*, exclude those stations in determining whether the threshold levels of §73.658(j)(4) have been reached.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Applicability of 47 C.F.R.
§73.658(g) and 47 C.F.R. §73.658(k)
to Home Shopping Inc.

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 1989; Released: March 17, 1989

By the Commission:

I. INTRODUCTION

1. Before the Commission for consideration is a request from Home Shopping Network, Inc. (HSN) seeking confirmation that the dual network rule, 47 C.F.R. §73.658(g), and the prime time access rule, 47 C.F.R. §73.658(k), do not apply to HSN.[1] Alternatively, if the rules are deemed applicable, a waiver of the rules is requested.

2. The dual network rule prohibits television stations from affiliating with a network organization that maintains more than one network of television stations unless the networks are not operated simultaneously or unless there is no substantial overlap in the territory served by the networks. The prime time access rule prohibits network affiliates in the top 50 television markets from devoting more than three hours of the four hour prime time period to the broadcast of network or off-network programming, with limited exceptions not relevant here. While both of these rules restrict network practices, they employ different definitions of the term "network." The dual network rule covers national and regional "networks" and references "ch. VII, J. of Report on Chain Broadcasting" as a definitional source. 47 C.F.R. §73.658 (a). On the other hand, for purposes of the prime time access rule, a network is defined more narrowly as an entity which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states. 47 C.F.R. §73.658(j)(4).

3. The HSN letters explain that HSN provides a 24 hour per day network service, HSN2, to 23 operating UHF stations. The service consists of programming of the Home Shopping Club. This programming is divided into segments that are broadcast live with a host who presents merchandise available for purchase by viewers. HSN also provides an overnight programming service, HSN Overnight, to 19 UHF stations. HSN Overnight programming has the same format but a different content from HSN2 programming. The service is available from midnight to 7 a.m., seven days a week, but is rarely carried for more than five hours per day.[2] In its letters, HSN concedes that its operations, as more fully described below, may technically bring HSN within the "network" definitions relevant to the dual network rule and the prime time access rule. However, HSN contends that because of the unique nature of its services, the rules are not applicable. After careful review of HSN's filings as well as the comments and reply comments submitted in response to those filings,[3] we have determined that, to the extent the cited rules are applicable to HSN, a waiver of the rules is appropriate.

II. DISCUSSION

A. The Dual Network Rule

4. *The Rule*. The dual network rule, §73.658(g) of the Commission's Rules, provides:

> No license shall be issued to a television broadcast station affiliated with a network organization which maintains more than one network of television broadcast stations: provided that this section shall not be applicable if such networks are not operated *simultaneously*, or if there is no substantial overlap in the territory serviced by the group of stations comprising each such network. [emphasis added]

As earlier indicated, for purposes of this dual network prohibition, "network" includes any national or regional network and appears to include within its scope, as a network, "the simultaneous broadcasting of an identical program by two or more connected stations." This is the statutory definition of "chain broadcasting." The rule, read literally, seems to prohibit Home Shopping Network's operation of its 24-hour-a-day HSN2 service concurrently with the midnight-to-7 a.m. operation of its HSN Overnight service.

5. *HSN's Arguments*. By way of background, HSN points out that the dual network prohibition was among the rules adopted by the Commission as a result of its 1941 *Report on Chain Broadcasting* [4] to remedy the overwhelming dominance of NBC and CBS of the radio broadcasting industry at that time. HSN adds that the dual networking prohibition, in particular, was a specific response to NBC's simultaneous operation of both the Red and the Blue radio networks and the concomitant concentration of power in one major network organization.

6. HSN argues that the dual network rule should not apply to the operations of HSN2 and HSN Overnight because they are significantly different in a number of respects from the traditional broadcasting networks that the rule was intended to target. In this regard, HSN states that it does not buy or produce programming for subsequent network distribution (the program service is live only), depend on advertising revenue, sell national spots within its programming, or provide news or public affairs programming to its affiliates. (HSN2 affiliates are offered 4-1/2 minutes per hour in which to insert local, public service programming or commercials, while HSN Overnight affiliated stations have seven minutes per hour in which to insert local programming or commercials). Thus, HSN contends, its operations are more analogous to that of a program syndicator, which typically distributes programming to stations via satellite on a simultaneous basis, than to a traditional broadcast network. Regulatory treatment of HSN should, HSN believes, parallel that of syndicators (to whom the rule has not been applied), not that of the traditional networks.

7. HSN further contends that excluding HSN2 and HSN Overnight from application of the dual network rule will have only minimal impact on competition and diversity. The two services will not operate simultaneously except in 10 to 20 of the country's larger markets, where there exist many alternative program services to provide a wealth of viewpoint diversity. Simultaneous operation will occur only at night during hours when HSN affiliates might otherwise be off the air. Finally, HSN argues that application of the dual network rule to its services would be contrary to the public interest because it would discourage the production of experimental programming and the effective use of new technologies in the distribution of broadcast services.

8. *Comments.* Of the parties filing comments in response to the June 22, 1988, *Public Notice* on HSN's letters, only National Broadcasting Company, Inc. (NBC) and Blackstar Communications, Inc. (Blackstar) substantively address the applicability of the dual network rule to HSN.[5]

9. NBC urges that finding the dual network rule inapplicable to HSN would be contrary to the plain language of the rule. NBC points out that the definition of "network" for purposes of the dual network rule includes any entity engaged in the "simultaneous broadcasting of an identical program by two or more connected stations" and that, though small broadcast networks existed in 1941 when the Commission adopted the rule, it did not exclude such networks from the definition.

10. Blackstar, on the other hand, argues that the Commission should act favorably on HSN's requests. Blackstar, which is partially owned by a subsidiary of HSN,[6] is a minority controlled corporation formed for the purpose of acquiring, owning and operating broadcast stations in the top 50 markets. Blackstar maintains that the Commission should take into account the valuable role that HSN plays in helping new and struggling UHF stations get off the ground; an HSN affiliation provides assurances to lenders that such stations can survive. If the dual network rule is applied to HSN, Blackstar says, it will preclude future HSN affiliations with UHF stations in areas where HSN already has an affiliate. This result will have a "devastating impact" on entities trying to enter the commercial television market without the benefit of substantial financial resources.

11. *Analysis.* A party seeking a waiver of the Commission's rules must demonstrate that circumstances "peculiar" to its own situation distinguish it from "the general run of situations to which the rule applies" and make application of the rule to it "less appropriate." *Request for Waiver of the Prime Time Access Rule by WTHR - TV*, 47 RR2d 1130, 112 (1980). Based on our review and analysis of the HSN letters and the comments, we believe that HSN has met this standard for obtaining a waiver of the dual network rule.

12. We note that the Commission has previously waived the dual network rule in a situation where it was technically applicable but where the consequences of applying the rule were deemed inconsistent with the underlying purposes of the rule. In *American Broadcasting Co., Inc.* 11 FCC 2d 163 (1967), the Commission granted a waiver of the dual network rule to ABC. The proposal under consideration in that case involved four new specialized ABC radio networks. The operation of the four networks would result in simultaneous broadcast of a limited amount of ABC programming by several affiliates in the same market. The Commission felt that since the purpose of the dual network rule was "to preclude any substantial operation of two networks [by the same organization] on a simultaneous basis," *id.* at 165, and since the amount of simultaneously broadcast programming in the instant case would be minimal, the purpose of the rule would not be thwarted by a waiver. Indeed, the Commission concluded that ABC's proposal "merits encouragement as a new and imaginative approach to networking . . . ." *Id.* at 168.

13. A like conclusion appears warranted here. While HSN's simultaneous operation of HSN2 24 hours a day and of HSN Overnight from midnight to 7 A.M. would appear to conflict with the dual networking prohibition, HSN does not raise the type of concerns the dual network rule addresses. On the contrary, HSN2 and HSN Overnight are materially different from the dual network operations of NBC that prompted adoption of the rule in 1941. Exempting HSN from application of the rule will not thwart the purposes of the rule; instead, it will serve the public interest.

14. The record suggests that granting a waiver of the dual network rule under the circumstances herein presented would not in any way compromise the rules' objectives. The dual network rule is intended to promote program diversity by ensuring that a single organization does not dominate the broadcast services in an area by operation of two networks. It also has the goal of ensuring economic competition in the advertising market. In adopting the rule the Commission cited advertising discounts and combinations in concluding that "[t]he operation of the Red and Blue networks by NBC gives it a decided competitive advantage over the other two networks [in competing for advertising]." *Chain Broadcasting Report* at 31, 70.

15. It is clear here that, given the unique nature of HSN2 and HSN Overnight, simultaneous operation of the networks will not threaten either program diversity or economic competition in the advertising market. As HSN points out, HSN2 and HSN Overnight operate simultaneously only during the limited early morning hours between midnight and 7 A.M. This time period is outside those hours when the overwhelming percentage of television viewing occurs, and, in any event, the actual amount of simultaneous operation is limited to an average of only 3.7 hours per 24 hour period in a limited number of markets. Thus, as in *American Broadcasting Cos., Inc.*, the overlap of HSN2 and HSN Overnight programming, and any consequent threat to program diversity, is *de minimus*. Nor does the simultaneous operation of HSN2 and HSN Overnight implicate any concerns about competition in the advertising market, since the operations are not dependent on the sale of national advertising but generate revenues principally through the sale of products marketed in its programming.

16. Moreover, permitting the continued simultaneous operation of HSN2 and HSN Overnight will be consistent with the Commission's goals of encouraging alternatives to traditional networking. As stated in *American Broadcasting Cos., Inc.*, it is "of more than usual importance to encourage to the extent possible innovation and experimentation in the operation of networks . . . ." *Id.* at 164-165. HSN, with its unique programming fare, method of generating revenues, and operational approach, would appear to be the kind of innovative enterprise the Commission contemplated encouraging in that decision. We also agree with Blackstar's comments to the effect that the

public interest benefits of waiving the dual network rule and permitting the continued growth of both HSN2 and HSN Overnight are heightened by the fact that an HSN affiliation may assist minorities and small business entities obtain financing to initiate a new service or enhance an existing service insofar as the affiliation assures lenders that the broadcast operation has a viable financial future.

B. The Prime Time Access Rule.

17. *The Rule.* The prime time access rule prohibits network affiliates in the top 50 television markets from devoting more than three hours of the four-hour prime time period to the broadcast of network or off-network programming, with certain limited exceptions not relevant here. For the purpose of this rule, a network is defined as "an entity which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states; and/or any person, entity or corporation controlling, controlled by or under common control with such person, entity, or corporation." 47 C.F.R. §73.658(j)(4). HSN2, as of the date of its last filing in this matter, served 23 stations[7] in more than ten states; HSN Overnight served nineteen stations in eighteen states. Thus if HSN2 and HSN Overnight are treated as a single network and the affiliates of both operations aggregated, the restrictions of the prime time access rule would apply to stations affiliated with both networks. Furthermore, even if the services are not aggregated, HSN2 will technically fall within the ambit of the rule at such time as it has 25 or more affiliates.[8]

18. *HSN's Arguments.* HSN contends that the prime time access rule should not be applicable to HSN operations. HSN argues that when the Commission promulgated the rule in 1970, it did not contemplate application of the rule to limited special networks. Rather, it intended that the rule apply only to the three national television networks, a fact that HSN argues is made clear by the holding in *Christian Broadcasting Network, Inc.*, 87 FCC 2d 1076 (1981). In that case, the Commission granted the Christian Broadcasting Network a temporary waiver of the prime time access rule and financial interest and syndication rules pending the outcome of a general study of the network rules.

19. HSN further argues that application of the prime time access rule to HSN would not be in the public interest. First, imposing the rule on HSN would curtail HSN operations and thereby undermine the Commission's goal of encouraging new networks and alternative programming. Secondly, if the prime time access rule is applied to HSN, HSN affiliates will have to find programming other than HSN programming to fill the access period. This requirement will strain the already tight budgets of the affiliates, most of whom, HSN says, are in small markets and/or are owned by minority entrepreneurs. These stations will, at best, be able to afford only inexpensive programming that may not be attractive to viewers.

20. Finally, HSN points out that it would be illogical to apply the prime time access rule to HSN on the basis of the combined operations of HSN2 and HSN Overnight. The rule was intended to affect programming during prime time. Yet if HSN2 and HSN Overnight operations are aggregated, the rule will be triggered by a service -- HSN Overnight -- that never operates during prime time.

21. *Comments.* As with the dual network rule, only the comments of NBC and Blackstar address in detail the applicability of the prime time access rule to HSN. NBC urges the Commission to reject the HSN waiver request, arguing that in the 1970 reconsideration of the prime time access rule, the Commission considered defining "network" to include only the three national networks but declined to do so. Rather, it established in Section 73.658(j)(4) an objective definition of what constitutes a "major television network" to provide, in effect, a "grace period" to allow the opportunity for emerging networks to develop into more mature networks. After that grace period ends and the network becomes fully developed, NBC argues, the rule should apply. Since, according to NBC, HSN has reached (or is about to reach) the thresholds set forth in the rule that mark the end of the grace period, HSN should be subject to the rule.[9]

22. Blackstar, however, supports a waiver grant to HSN. It states that HSN affiliates are often struggling UHF stations and argues that the prime time access rule should not be applied to HSN because these affiliates may be hard-pressed to find the financial resources to fill access periods with programming other than HSN programming.

23. *Analysis.* There is also precedent for waiving the prime time access rule in situations where circumstances make application of the rule illogical and contrary to the Commission's goals. In *Christian Broadcasting Network, Inc.*, 87 FCC 2d 1076 (1981), the Commission considered whether the existing network definition in 47 C.F.R. §73.658(j)(4) should be applied to bring the Christian Broadcasting Network (CBN) within the coverage of the prime time access, syndication, and financial interest rules. The Commission noted that the definition of "network" relevant to the three rules is an attempt to distinguish major networks from "regional or lesser" organizations. *Id.* at 1078. The rules, as limited by that network definition, thus attempt, on the one hand, to prohibit those presumably powerful organizations that fall within the "network" definition from anticompetitive program procurement practices and, on the other hand, attempt to ensure the development and growth of other "lesser" organizations that do not fall within the definition. *Id.* at 1077. Though CBN's expanding operations had brought it very close to the threshold levels of §73.658(j)(4), the Commission refused to view CBN as a major network and granted a limited waiver of the prime time access rule and financial interest and syndication rules pending further action in connection with an ongoing general review of the network rules. *Id.* at 1079.[10]

24. Like CBN, HSN is, in our view, not the kind of network entity that led to the adoption of the prime time access rule and generally does not present the problems that the rule addresses. The objectives of the rule, as articulated during the course of its initial consideration and adoption and in later discussions of it, involve a complex set of interrelated goals, but it was principally concerned with network control of the program process. The networks' incentives in the program supply market were found to be tied to their reliance on advertising revenues and the resulting necessity to create entertainment programming capable of attracting a large circulation of advertisers.[11] Freeing part of the prime-time period for non-network programming was part of the Commission's attempt to lessen the networks' hold on program producers in their capacity as the principal purchasers of their product.[12] A separate benefit of the

prime-time access rule, of course, was to guarantee some access to the prime-time period by entities other than major network organizations.

25. HSN's operation, as described to us, would not seem to raise the principal concerns that moved the Commission to adopt the prime time access rule in 1970. HSN is not involved in the production or acquisition of traditional entertainment programming; it offers only specialized programming. Nor must HSN program to attract national advertisers since it is not dependent on national advertising for its revenues. Most important for our purposes here, there is no indication that HSN poses any serious competitive challenge to other television program suppliers, network or non-network. Indeed, HSN Overnight programming is not even available during prime time. Thus, waiving the rule for HSN would not in any meaningful way limit independent program producers' access to the television stations on which the HSN Overnight programming service appears. Such a waiver, by facilitating the growth of a program service alternative to those supplied by the traditional networks and through facilitating the creation of new UHF television stations, will assist in the accomplishment of major goals of the rule. Under such circumstances, we see no benefit in applying the prime-time access rule to HSN, and indeed this action is consistent with the way in which the Commission has historically interpreted the rule. *See, e.g., Notice of Proposed Rule Making* in Docket 82-345, 47 Fed. Reg. 32958, n.28 (1982).

26. *Conclusion.* In sum, we believe that, though the dual network rule and prime time access rule may technically apply to HSN, HSN has met the standards for obtaining waivers of those rules by demonstrating that its operations are unique and distinguish it from the type of organization to which the rules were intended to apply. Thus application of the rules to HSN would serve no meaningful purpose.

27. Accordingly, IT IS ORDERED that HSN's request for a declaratory ruling that 47 C.F.R. §73.658(g) and (k) do not apply to HSN is DENIED. IT IS FURTHER ORDERED that HSN's request for waivers of 47 C.F.R. §73.658(g) and (k) is HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] On June 25, 1987, HSN filed a letter asserting that the dual network and prime time access rules as well as the syndication and financial interest rules are inapplicable to its existing and planned operations. On June 14, 1988, HSN submitted a second letter updating the information supplied in the June 25 letter. The 1988 letter does not discuss the financial interest and syndication rules because the aspect of the HSN operation potentially affected by those rules, HSN's Home Shopping Game, was discontinued by the time this second letter was written. Thus, HSN's earlier request concerning these rules is now moot and, accordingly, is not herein addressed.

[2] It is carried by stations an average of 3.7 hours each day.

[3] On June 22, 1988, we issued a *Public Notice* soliciting comment on the HSN letters as well as on letters from Univision, Inc. and Fox Broadcasting Company concerning the prime time access rule, financial interest, and syndication rules. Comments specifically directed to the HSN letters were received from National Broadcasting Company, Inc., Blackstar Communications, Inc., Media Access Project, Westinghouse Broadcasting Company, Inc., Cap Cities/ABC, Inc., CBS Affiliates, and CBS, Inc. Reply Comments were received from HSN. For a summary and analysis of the comments, *see* paragraphs 7-9, 19, 20 *infra*. The Fox and Univision matters will each be addressed separately and are not considered herein.

[4] *Report on Chain Broadcasting*, Docket No. 5060 (May, 1941) [" *Chain Broadcasting Report* "], *aff'd sub nom., National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). The dual network rule as enacted in 1941 only applied to radio networks. It was extended by the Commission to cover television networks in 1946. *See Amendment of Part 3 of the Commission's Rules*, 11 Fed. Reg. 33 (Jan. 1, 1946).

[5] Two companies, Group W and CBS, Inc., indicate that they take no position on the HSN requests but note that HSN operations are different from those of the traditional networks. Cap Cities/ABC, Inc. and CBS Affiliates take no position on the HSN requests but object to assertions that the rules apply only to CBS, ABC, and NBC. One other commenter, Media Access Project (filing on behalf of the Telecommunications Research and Action Center and National Association for Better Broadcasting) opposes HSN's requests on the procedural ground that the HSN letters are an attempt to "privatize" the Commission's decision making function and that the determinations HSN seeks should be made in the context of a rule making. We believe, however, that HSN has met the procedural requirements for obtaining a waiver. *See* paragraph 11 *infra*. The action taken herein does not go to the bases of the relevant rules but rather exempts one organization from operation of the rules because of the unique nature of its operations. Therefore a Rule Making proceeding is not required.

[6] Blackstar's voting stock, which comprises fifty-five percent of all of its stock, is owned by minorities. The rest of its stock, all non-voting, is held by a subsidiary of HSN.

[7] This figure includes one satellite station.

[8] HSN's 1987 letter mentioned that HSN, even then, had signed contracts to purchase additional stations in three markets.

[9] MAP also briefly makes this argument.

[10] The Commission substituted 30 hours for 15 hours as the measure of the amount of program hours CBN could distribute before acquiring "network" status.

[11] *Report and Order*, 23 FCC 2d 382, 391-92, *on recon.* 25 FCC 2d 318 (1970), *aff'd* 442 F.2d 470 (2d Cir. 1971). *See also Prime Time Access Rule*, 44 FCC 2d 1081 (1974).

[12] The financial interest and syndication rules were also promulgated to achieve this goal. These rules forbid a network to obtain a financial or proprietary right in the exhibition, distribution or use of programs produced by others (except for the exclusive right to network exhibition in the United States) and to engage in domestic syndication of any program or foreign syndication of independently produced programs, respectively. *See* 47 C.F.R. §73.658(j).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS Transmittal No. 1493
Tariff F.C.C. No. 16

Request for Waiver of
the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: February 27, 1989; Released: February 28, 1989

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. On January 24, 1989, AT&T Communications (AT&T) filed the above-referenced transmittal, proposing rates, terms, and conditions for Federal Telecommunications System 2000 (FTS 2000). With its filing, AT&T submitted two versions of the tariff pages containing the revisions, with the prices deleted from one version (Redacted Version). AT&T also filed an application for special permission, requesting waiver of Sections 61.2, 61.54(j), and 61.72 of the Commission's Rules, 47 C.F.R. §§ 61.2, 61.54(j), 61.72, to the extent that those rules require AT&T to file on the public record and otherwise publish the FTS 2000 rates.[1] AT&T proposes to file only the Redacted Version on the public record. On February 3, 1989, the Commission released a Public Notice requesting comments on AT&T's waiver request. The Bureau subsequently adopted an Order deferring until further notice the date for filing petitions against Transmittal 1493.[2] Comments on AT&T's waiver request were filed on February 10, 1989; replies were filed February 17, 1989. In this Order we deny AT&T's application for special permission.

II. POSITIONS OF THE PARTIES

2. AT&T states in its waiver request that Section 203(b)(2) of the Communications Act authorizes the Commission, in its discretion and for good cause shown, to modify any requirement of that section. AT&T argues that good cause for allowing such a modification exists when enforcement of the public tariff filing requirement of Section 203(a) in a particular instance would disserve the public interest or cause substantial competitive harm to a carrier, without being necessary to achieve any of the objectives underlying Section 203. AT&T Waiver Request at 3, *citing* Competitive Carrier Proceeding, Further Notice of Proposed Rule Making, 84 FCC 2d 445, 479-80 (1981). According to AT&T, requiring it to place on the public record the FTS 2000 rates would competitively disadvantage the carrier, in the rebid process and otherwise, with no offsetting regulatory justification. *Id.* at 4.

3. Four parties filed oppositions to AT&T's waiver request; GSA filed comments in support of the request. [3]

A. Arguments in Support of AT&T's Waiver Request

4. GSA asserts that it is committed to maintaining the confidentiality of all pricing information submitted by both contractors (AT&T and US Sprint). GSA Comments at 4. It notes that it has denied four Freedom of Information Act requests for the FTS 2000 pricing information. *Id.* at 4 n.*. GSA argues that disclosure of prices for the service will jeopardize GSA's ability to negotiate lower prices in the fourth and seventh years of the contracts.[4] "Unfettered dissemination" of the prices will jeopardize the Government's receipt of the best prices, will interfere with its relationship with AT&T in this and future projects, and may chill GSA's contractual relationships with other carriers. *Id.* at 6. GSA also contends that the Commission's internal tariff review process is unimpeded, since it "has full access to the pricing information." *Id.* at 5. It asserts that the check provided by public scrutiny is preserved through protected disclosure of pricing information to "counsel for the interested party."

B. Arguments in Opposition to AT&T's Waiver Request

1. Section 203 (a) Requirements

5. Three of the opponents contend that grant of AT&T's requested waiver would "strike at the *raison d'etre* of Section 203: to expose the carrier's rates to public scrutiny to ensure against unjust discrimination." CompTel Opposition at 2; MCI Comments at 1, 4-5; Martin Marietta Comments at 3; *see also* NTN Opposition at 3.

6. MCI cites to the legislative history of the Act to demonstrate that Congress intended that AT&T's rates be available to the public. In adopting Section 203(a) of the Act, MCI states, both the Senate and the House of Representatives asserted that the provision "requires publication and filing of schedules and charges."[5] MCI argues that this statutory purpose is confirmed by other provisions of the Act. It notes that Section 203(b)(1) provides that "[n]o change shall be made in the charges . . . which have been so filed and published except after . . . notice to the Commission and to the public." *Id.*

7. Further, MCI observes, Section 203(c) provides that "[n]o Carrier, unless otherwise provided by or under authority of the Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and the regulations made thereunder." *Id.* at 5-6.

8. Finally, MCI notes, Sections 204 and 205 of the Act provide that whenever a new rate is filed, the Commission may upon public complaint conduct an investigation and afford the public a full hearing. *Id.* at 6. MCI maintains that the purpose of the statutory scheme summarized above would be "totally frustrated" if the public were denied access to the "most elementary, yet essential, information concerning AT&T's FTS 2000 service -- its prices." *Id.*

9. CompTel also charges that allowing AT&T to "hide its FTS 2000 rates from public view would circumvent several bedrock provisions of Title II of the Act." CompTel Opposition at 3. According to CompTel, grant of the waiver would "nullify" Section 208 by depriving parties of the information upon which a complaint against FTS 2000 rates could be based, or upon which a Commission hearing under Section 204 might be instituted. *Id.* Martin Marietta observes that AT&T is unable to cite any case in which the Commission has au-

thorized a dominant carrier to keep its rates secret. *See* Martin Marietta Comments at 3. No such precedent exists, Martin Marietta asserts, because Section 203(a) explicitly provides that rates must be filed and kept open for public inspection.

2. Commission discretion under Section 203 (b) (2)

Section 203(b)(2) of the Communications Act, 47 U.S.C. § 203(b)(2), provides:

> The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular circumstances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than ninety days.

10. Each of the petitioners asserts that Section 203(b)(2) does not empower the Commission to waive the fundamental directive in Section 203(a), namely, that the dominant carrier "file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers . . . ."

11. According to MCI, AT&T posits that Section 203(b)(2) authorizes the Commission to waive Section 203(a), as well as Sections 61.2, 61.54(j), and 61.72 of the Rules. MCI Comments at 3. MCI states that, under AT&T's formulation of Section 203(b)(2), there appears to be no limitation on the extent to which the Commission might "modify" AT&T's tariff filing obligations. *Id.* at 7. MCI accuses AT&T of attempting to "eviscerate the Act in a most significant manner and, in the process, to render the tariffing requirement superfluous with regard to FTS 2000 and probably other AT&T services to follow." *Id.* at 8. Both Martin Marietta and MCI argue that the courts have explicitly rejected AT&T's broad interpretation of Section 203(b).[6]

12. MCI predicts that a Commission grant of the requested waivers for the reason cited by AT&T, namely, the presence of competition in the marketplace, would encourage AT&T to file all its tariffs without rates. *Id.* at 8 n.*.

3. Inadequacy of AT & T showing

13. NTN suggests that the Commission could only grant the requested waiver if AT&T demonstrated that its FTS 2000 bid is unique. It argues, however, that AT&T has not met its burden under Section 203(b) by showing unique considerations specific to the FTS 2000 bid. NTN Opposition at 3. MCI, on the other hand, argues that even if the Commission possessed the authority to waive Section 203(a), public interest considerations would forbid grant of the waiver. MCI Comments at 12-13. It maintains that the Commission is obligated to afford the public both a "meaningful opportunity" to review tariff prices and the opportunity for a hearing on questions raised by those prices. According to MCI, the Commission could not fulfill its public responsibility if it denied the public information regarding AT&T prices or accepted a filing that resulted in "secret rates" for a single customer. *Id.* at 13.

14. CompTel also argues that AT&T has not presented an adequate showing to justify waiver of its obligation to publish rates -- "the very essence of a tariff." CompTel Opposition at 5. In particular, CompTel claims, AT&T has not supported its assertion that publication in this case would disserve the public interest. CompTel declares that the facts that FTS 2000 is subject to a rebid process in four years and that the FTS 2000 procurement states that GSA will not disclose the successful bidders' rates do not justify the relief sought by AT&T. *Id.* at 4. CompTel contends that, to the extent that the requirements of the Communications Act are inconsistent with GSA's disclosure plans for FTS 2000, it is the GSA provision which must yield.

15. Martin Marietta also asserts that AT&T's contract with GSA contains requirements that directly affect AT&T's FTS 2000 rates, and that, consistent with Section 203(a), AT&T must be required to file its FTS 2000 contract as well as its rates. Martin Marietta Comments at 8. Martin Marietta identifies a retroactive rate reduction provision in the contract, and asserts that AT&T may have made other commitments, not included in the Request for Proposals (RFP) or the tariff, that affect the carrier's rates. *Id.* at 9.

C. Reply Comments

1. AT&T

16. AT&T contends that GSA's comments demonstrate that nondisclosure of AT&T's rates is in the public interest.[7] It asserts that it has complied with the tariff filing procedures by providing the Commission with tariff revisions which include all the rates, terms, and conditions for the service. AT&T represents that it does not seek to prevent all public disclosure, but only to limit the disclosure of the rates through "a modification of the publication requirement, as Section 203(b)(2) contemplates." AT&T Reply at 5. It contends that the Commission has "ample authority to remove the requirements of tariff filings where appropriate."[8]

17. AT&T challenges opponents' contention that the D.C. Circuit's opinion in *MCI* v. *F. C. C.* precludes a decision to grant AT&T's application. It observes that the Bureau itself has stated that the MCI case "says only that the Commission lacks authority to prohibit common carriers from filing tariffs. The Court reached no other question."[9] AT&T characterizes its request as a modification, rather than a wholesale abandonment or elimination of the tariff requirement. *Id.* at 7-8. It further asserts that if the Commission is authorized under Section 203(b)(2) to relieve non-dominant carriers of all tariff filing requirements, "as it has done," it has the same authority to allow the modification AT&T seeks. *Id.* at 8-9.

18. In addition, AT&T argues that good cause for nondisclosure lies in the fact that "unlimited disclosure" of FTS 2000 rates would harm AT&T and impair the "integrity and effectiveness of the FTS 2000 price redetermination." *Id.* at 9. AT&T claims that because it will be limited in the rebidding process by its current prices, disclosure of those prices would afford US Sprint an advantage in estimating the prices AT&T will submit in the rebid. *Id.* at 10. AT&T dismisses suggestions that this problem could be resolved by requiring US Sprint to disclose its FTS 2000 rates as well, arguing that such disclosure would only compound the injury to the public. *Id.* at 10-11. Moreover, AT&T represents that the FTS

2000 rate information has been made available to all parties who have requested it from AT&T.[10] It identifies Martin Marietta as one of the parties which has requested and received the rate information. *Id.* at 12.

19. AT&T dismisses as "meritless" MCI's contention that public disclosure of FTS 2000 rates is required in order that AT&T's other customers may compare the rates with the prices they pay to AT&T for other services to determine if those customers have been subjected to discriminatory rates. AT&T contends that Section 201(b) of the Act specifically allows AT&T to grant preferential treatment to the government, notwithstanding the nondiscrimination provision of Section 202. *Id.* at 13-14. Finally, AT&T denies that grant of this waiver would constitute a precedent for future waivers. *Id.* at 14.

2. Martin Marietta Reply

20. Martin Marietta contends that the interests of all telecommunications users, including GSA, are best served by making the rates for FTS 2000 publicly available. It contests GSA's argument that rate confidentiality is essential to the success of the FTS 2000 project.[11] Keeping prices secret, Martin Marietta argues, diminishes, rather than enhances, competition. It contends that "[w]ithout disclosure of the FTS 2000 prices, each contractor would only bid against itself during the rebid process. With disclosure, each contractor would bid against the other as well." Martin Marietta Reply at 2-3.

21. Martin Marietta disputes GSA's assurance that maintenance of price confidentiality will cause no known harm to the Government as a customer. *Id.* at 4. It argues that, in the long run, the Government will be seriously injured if AT&T "is permitted to cut secret deals in selected procurements." *Id.* Martin Marietta predicts that competitors will be reluctant to participate in future Government and commercial procurements if AT&T is permitted to withhold its rates for common carrier services. It also speculates that AT&T seeks to prevent disclosure of its rates because those rates may not be compensatory. *Id.* at 5. Martin Marietta contends that the first step in assessing the lawfulness of AT&T's FTS 2000 rates is to require public disclosure. In light of the volume of rate information which must be reviewed, Martin Marietta also recommends that AT&T be directed to disclose its rates in both hard copy and computer-readable form. *Id.* at 7.

III. DISCUSSION

22. Although we do not accept claims that the Commission lacks the power to waive or modify the Section 203(a) requirement that tariff charges filed with the Commission be kept "open for public inspection," we believe an extremely compelling showing would be required to grant such a request. The oppositions have correctly noted that the framers of the Interstate Commerce Act, upon which the Communications Act is based, attached considerable importance to public rates. *See, e.g.*, 49 U.S.C. § 6. The procedures that AT&T has proposed to make secret rates available to persons who may wish to file petitions to reject, suspend or investigate this tariff transmittal would not be sufficient to satisfy all of the framers' purposes.

23. The assertion that disclosure of the rates could cause competitive harm to AT&T is clearly not sufficient to justify granting this extraordinary waiver request. AT&T could quite plausibly claim that disclosure of any AT&T tariff rate for any service could cause AT&T competitive harm. GSA's claim that disclosure would undermine its ability to obtain the lowest possible price in any rebidding seems to contradict AT&T's claim that disclosure would undermine its ability to obtain the highest possible price in any rebidding. Moreover, it seems unlikely that disclosure of these rates would have a significant impact upon a rebidding process that occurs four years from now. AT&T clearly has not demonstrated that disclosure of these rates will produce any monumental private or public harm that could justify granting this unprecedented waiver request. AT&T's request for waiver of Sections 61.2, 61.54(j), and 61.72 of the Commission's Rules, 47 C.F.R. §§ 61.2, 61.54(j), 61.72, must therefore be denied.

24. Inasmuch as AT&T has filed only the Redacted Version of Transmittal 1493 on the public record, we hereby deem this transmittal void for purposes of the notice provisions contained in Section 203(a) and Section 203(b)(1) of the Act, and for purposes of the filing periods set forth in Section 1.773 of the Commission's Rules. Such notice and filing periods shall be tolled only upon the subsequent filing of a new transmittal by AT&T which includes the FTS 2000 rates on the public record.

IV. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED that the above-referenced application for special permission filed by AT&T Communications IS DENIED.

26. IT IS FURTHER ORDERED that AT&T file for the removal of the material contained in Transmittal 1493 from the proposed tariff pages in Tariff No. 16 not later than March 3, 1989, to be effective March 6, 1989.

27. IT IS FURTHER ORDERED that Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, ARE WAIVED, and Special Permission No. 89-187 is assigned for this purpose.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Letter from W.E. Lind, Administrator, Rates and Tariffs, AT&T, to Secretary, Federal Communications Commission, Application No. 511, Jan. 24, 1989. AT&T also indicates that it is requesting confidential treatment of the version of its filing containing the proposed rates (Unredacted Version). *See id.* at 2 n.*.

[2] AT&T Communications, Tariff F.C.C. No. 16, Transmittal No. 1493, DA 89-141, released Feb. 6, 1989.

[3] Comments of the General Services Administration, filed Feb. 10, 1989 (GSA Comments); Comments of Martin Marietta Corporation, filed Feb. 10, 1989 (Martin Marietta Comments); Comments in Opposition, filed Feb. 10, 1989, by MCI Telecommunications Corporation (MCI Comments); Opposition to Request for Waiver, filed Feb. 10, 1989, by Competitive Telecommunications Association (CompTel Opposition); Oppo-

sition of National Telecommunications Network, filed Feb. 13, 1989 (NTN Opposition). NTN also filed a motion for leave to make a late filed pleading.

[4] GSA Comments at 3-4. GSA states that AT&T and US Sprint are bound by their prices over a 10-year period, and that GSA can require a price redetermination between the contractors at the fourth and the seventh years of their commitments. *Id.* at 6.

[5] MCI Comments at 5 (citing Senate Report No. 781, 73d Cong., 2d Sess. 1934 at 4, and House of Representatives Report No. 1850, 73d Cong., 2d Sess. 1934 at 5).

[6] MCI cites AT&T v. F.C.C., 487 F.2d 864 (2d Cir.1973); AT&T v. F.C.C., 503 F.2d 612 (2d Cir. 1974); and MCI Telecommunications Corp. v. F.C.C., 765 F.2d 1186 (D.C. Cir. 1985), as examples of decisions rejecting a broad interpretations of the Commission's power to modify Section 203 requirements.

[7] AT&T Reply, filed Feb. 17, 1989, at 2.

[8] *Id.* at 6 (citing Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorization Therefor, CC Docket No. 79-252, Further Notice of Proposed Rule Making, 84 FCC 2d 445, 479 (1981)).

[9] *Id.* at 7 (citing AT&T Communications, Revisions to Tariff F.C.C. Nos. 1, 9, and 10, CC Docket No. 85-203, Mimeo No. 6320, released Aug. 6, 1985).

[10] The information is made available by AT&T under non-disclosure agreements. *See* Letter to Chief, Tariff Division, from T.H. Norris, AT&T, dated Feb. 6, 1989.

[11] Reply Comments of Martin Marietta Corporation, filed Feb. 17, 1989 (Martin Marietta Reply), at 2-4.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-46

In the Matter of

Policies to Encourage
Interference Reduction
Between AM Broadcast Stations

NOTICE OF PROPOSED RULE MAKING

Adopted: February 22, 1989; Released: March 17, 1989

By the Commission: Commissioners Quello and Dennis issuing separate statements.

INTRODUCTION

1. The Commission is initiating this *Notice of Proposed Rule Making* (*NPRM*) to develop a formal procedure for AM licensees to reduce interstation interference and to consider certain changes in our AM processing rules that may facilitate such a procedure. Such reductions in interference between AM stations would improve the overall quality of AM broadcasting, thereby improving service to the public.

2. This *NPRM* is an outgrowth of the Mass Media Bureau's *Report on the Status of the AM Broadcast Rules*, RM-5532, (*AM Report*) released April 3, 1986. The *AM Report* addressed a number of technical, legal and policy issues, seeking to identify opportunities to make changes in existing rules to allow AM broadcasters to compete more effectively in today's broadcast marketplace and thereby enhance their service to the public.

3. Comments received in response to the *AM Report* helped identify the technical issues appropriate for further study, and on August 17, 1987, the Commission released a *Notice of Inquiry*[1] (*AM NOI*) to provide a comprehensive review of the technical principles pertaining to AM assignment criteria and related issues. One of the issues addressed in the *AM NOI* was the question of whether the public would benefit from allowing the resolution of interference issues through agreements between the various affected parties. The Commission believes that certain changes in our existing Rules may be warranted to facilitate the establishment of a formal procedure for AM licensees to reduce interstation interference. Before setting forth our rule making proposal in this regard, some background information will help place these issues in perspective.

BACKGROUND

AM Service

4. While the AM broadcast service is the oldest broadcasting service, it remains one of the most technically complex to administer. This is largely due to the propagation characteristics that exist in the AM band. In contrast to other frequency bands in which broadcast services are authorized, the propagation characteristics of the AM band vary greatly with frequency and ground conductivity, and more importantly, between day and night.[2] The FCC has developed complex technical AM broadcast assignment principles that take into account these varying propagation characteristics.

5. The Commission's current technical broadcast assignment principles have evolved over many decades, coinciding with the considerable growth in the AM service.[3] The Commission's Rules and practices reflect its historic concern with respect to interference protection for AM licensees. Initially, the Commission was concerned with establishing large numbers of AM stations across the country to serve the nation, and it developed assignment rules and interference criteria with this goal in mind. These rules effectively defined the station's coverage area as well as the degree of protection that the station could obtain within that service area by proscribing specific limits to interference that could be caused by other stations.

6. The AM broadcasting service has matured significantly since the 1930's, and the radio marketplace has undergone tremendous changes. Virtually all of the United States receives multiple full-time radio services, and there are approximately 4,900 AM stations currently authorized. In addition, the Commission has authorized more than 5,300 FM stations which have significantly added to the choices of aural broadcast service available to the public.

7. Broadcast and cable television have also become an important source of local information and entertainment for the public. Almost 1700 television stations have been licensed by the Commission, including commercial and educational UHF and VHF stations as well as UHF and VHF low power television stations. This growth has occurred in markets of all sizes. In addition, a substantial increase in the availability of alternative media delivery sytems has added to the diversity of information sources for the public, as well as increased the level of economic competition in the marketplace. Significant new technologies include cable television, video cassette recorders (VCR's), satellite master antenna systems (SMATV's), home satellite dishes and multipoint distribution systems (MDS) as well as multichannel MDS systems.

8. Moreover, additional growth in traditional broadcast radio service can be expected due to several recent Commission actions. For example, in BC Docket 80-90 and related proceedings, the Commission established 689 new commercial FM allotments, most of which are located in medium and small radio markets, and created three new classes of FM channels to encourage the development of even more FM stations.[4] Furthermore, a significant number of new AM stations are likely to be licensed in the future when the band from 1605 kHz to 1705 kHz becomes available for AM broadcasting as a result of international agreement recently reached in Rio de Janeiro.[5]

9. These developments have dramatically altered the listening habits of the broadcast audience, generally resulting in significant changes to the economic position of AM stations. During the last ten years, Commission studies have shown a substantial decline in the percentage of profitable AM stations, as well as drastic increases in the average annual lost revenue for AM stations or AM/FM

combinations.[6] In addition, AM station sales prices have, on average, steadily declined while sales prices for the FM counterparts have consistently risen.

10. Furthermore, the AM service's share of the national listening audience has experienced a marked reduction, compared to a steady rise in FM audience share. The Commission's *AM Report* showed that by 1978, the majority of the radio listening audience had shifted from AM to FM. Even so, in 1980, forty of the top fifty stations in terms of metropolitan cumulative rating were AM stations. By the fall of 1984, however, only fifteen AM stations were found in the top fifty.

11. The quality of the AM service has decreased considerably when compared to newer services. Naturally occurring atmospheric noise found in the AM band is a pervasive source of degradation to the AM broadcast service that generally limits the minimum usable field strength of an AM station both day and night. In addition to atmospheric noise, the minimum usable field strength is further degraded by interference resulting from congestion in the AM band – there has been a substantial increase in co-channel and adjacent channel interference from other AM stations. Finally, man-made noise has proliferated with increased use of electrical devices in the home and at the work place. All of these factors have combined to degrade the overall quality of the AM service. Because newer technologies are not affected to the same extent, the relative quality of the AM service has suffered a steady decline.

12. Commenters including NAB, ABES, EIA and numerous others have all emphasized the need to improve the overall quality of the AM service. Group W stated that "the single highest priority for FCC action to improve AM radio in this country would be to act now to reduce deleterious interference which is present throughout the AM band".[7] Commenters have encouraged the Commission in its efforts to examine our Rules and past licensing policies to identify changes that could reduce congestion in the AM band and thus improve the quality of the AM service.

13. The considerable crowding in the AM band has forced many AM stations to develop elaborate directional antenna systems in an attempt to "fit in" to already congested service areas. As a consequence, AM licensees often have convoluted service areas that differ from day to night, disrupting service to their listeners. Our Rules have operated to allow as many authorizations as technically feasible, promoting an expansion in the number of stations. But this increase has come at the expense of quality. While the system currently supports expansion of service, it does not effectively allow for contraction of service where such reductions may improve the overall quality of AM service. Thus, the market does not have the ability to reach a true equilibrium of balanced, quality service.

14. We believe that the public would benefit from cleaner, more reliable service areas for AM licensees. Therefore we wish to consider the public interest utility of restructuring our policies and Rules to allow for contraction as well as expansion of service, when such contraction would allow improved service overall. While such contraction may result in a marginal loss in the number of stations receivable in some areas, the net gain in quality of the AM service could well better serve the public interest.

15. Thus, at this advanced stage of AM development, it may be appropriate for the Commission to consider establishing a mechanism by which licensees can coordinate to reduce interference. This proposal could permit some contraction of the AM broadcast market that would offer an opportunity for overall improvement of the AM service by reducing congestion in the AM band and allowing the remaining stations to improve service to their communities and strengthen their competitive position in the broadcast marketplace, thereby providing significant benefits to the listening public.

Technical Assignment Principles

16. Before outlining our proposal, it is necessary to discuss the evolution and application of the Commission's technical assignment principles applied to AM licensees.[8] Under the Commission's Rules, proposals for groundwave AM service are examined in terms of a prohibition on the overlap of prescribed groundwave contours. This concept of "prohibited overlap" means that the prescribed contour of a proposed operation is not permitted to cause interference by overlapping the prescribed contour of any existing station.[9] In effect, interference may neither be caused nor received within the prescribed service contour. An exception to the prohibition on *received* interference, permitting overlap to the 1 mV/m contour, is provided in cases where there appears to be a particular need for additional service.[10]

17. The concept of protected contours is also applied to skywave signals for Class I Stations. A Class I station provides skywave service to a prescribed contour. Other stations are not permitted to cause interference by overlapping that contour. A Class II or III station provides groundwave service to a contour which is the greater of (a) the value prescribed in the Rules for its particular class, or (b) the value determined by interference received from the other facilities existing at the time the station was first authorized. The resulting contour must be adequate to encompass the community of license. Other stations may not radiate skywave signals which would have the effect of "shrinking" this contour by raising the RSS limit. As a practical matter, full-time Class II and III stations have interference limited service at night which results in coverage areas much smaller than they have during the day.

18. Although both daytime and nighttime protection are expressed in terms of protected and interfering contours, there are important differences in how protection is calculated. Daytime interference calculations are concerned with the location of pertinent protected and interfering contours along the paths joining the stations' service areas. Because groundwave signals travel a direct path, diminishing with distance, it is a simple matter of plotting the pertinent groundwave contours and determining if they overlap. At night, it also is necessary to take into account the quite different nature of skywave signal propagation. Because skywave signals are reflected by the ionosphere, they have the potential for providing wide-area coverage, as is the case with clear channel stations, or for causing area-wide interference. Thus, on the one hand, this means protecting the skywave coverage of clear channel stations, and on the other it means taking into account the potential skywave signals have to cause widespread interference to the groundwave service of other classes of stations. Appropriate methodologies were

developed to perform both types of skywave calculations and, in the case of the regional channels, to take multiple interfering signals into account.[11]

19. The Commission's Rules specify the signal strength contours[12] of areas protected from objectionable interference for each class of station. Some stations have nighttime limits that are equal or close to these contours, and therefore have moderately large nighttime service areas. Most stations, however, are limited by interference from other stations to contours of higher values than those nominally protected for their classes and are unable to provide wide area interference-free service.

20. The Commission's rules restrict the grant of applications whose effect would be to cause further interference.[13] The Commission's Rules define objectionable nighttime interference from another broadcast station as "the degree of interference when, at a specified field strength contour with respect to the desired station, the field strengths of an undesired station (or the root-sum-square value of field strengths of two or more stations on the same frequency) exceeds, for ten per cent or more of the time, the values set forth in these standards."[14] The rule excludes, however, many potentially interfering stations from the interference calculation because it further states that "the RSS value will not be considered to be increased when a new interfering signal is added which is less than 50% of the RSS value of the interference from existing stations."[15] Thus, a station actually receives greater levels of interference than are represented in the RSS values as calculated under our Rules.

21. In addition, while the rules thus prevented proposed new stations from causing objectionable interference, they did not necessarily prevent new stations from accepting interference that had the effect of eliminating nighttime coverage. The rules permitted new stations to receive such levels of interference so long as the requisite city coverage was provided. Many licensees found it desirable to accept large amounts of interference in exchange for the opportunity to obtain the desired facilities.[16] There have been many changes over the years which now call into question the interference situation faced by these stations. As discussed below, we are proposing to establish a procedure to help AM stations reduce interference, extend coverage and better compete in the marketplace.

22. Although occasional questions have been raised about the efficiency of proposals for new stations or for station modifications that would be subjected to extensive interference, most such applications were granted in recognition of the necessary trade-off of received interference for new service to be provided. Even though many stations originally elected to accept interference as a cost of obtaining the desired authorization, that is not to say that such licensees continue to find this situation desirable. Nonetheless, to date no alternative has been available to address this problem. The factors discussed above have contributed to considerable crowding in the AM band and an overall reduction in the quality of AM service. In light of current developments, it may be appropriate for the Commission to develop a mechanism that would promote the public interest by reducing crowding in the AM band in exchange for a marginal loss of service from some individual stations.

SUMMARY OF THE COMMENTS

23. The *AM NOI* suggested that it may be appropriate to consider whether it would be desirable to give AM station licensees the opportunity, through mutual agreement, to adjust the amount of interference to be permitted. The *AM NOI* suggested that the Commission might consider allowing AM licensees to negotiate levels of interference -- either by allowing a station to obtain greater interference protection than that resulting from current assignments, or to reduce its level of interference protection by relinquishing its right to specific protection afforded by the current rules.

24. Twenty-one formal comments and nine reply comments were filed during Phase I of the comment period for the *AM NOI* in response to the Commission's questions concerning additional assignment considerations.[17] Only fourteen of these commenters addressed the question of negotiated interference rights. Nine of these commenters opposed the concept, including the National Association of Broadcasters (NAB), the Association for Broadcast Engineering Standards (ABES), the Electronic Industries Association (EIA), CBS and Capital Cities/ABC. They were concerned that such an approach could cause a further degradation in the quality of AM service as a whole and would thus be contrary to the stated purpose of the *AM NOI* to improve the quality and competitiveness of AM service.

25. Five commenters found merit in the proposal. For example, Group W supported interference negotiation that would make it possible for a licensee to reduce the interference being received. It pointed out that "grandfathered interference rights" have in some instances led to a level of interference beyond that contemplated by the Commission's Rules. According to Group W, the Commission created certain grandfathered interference rights on an *ad hoc* basis as a result of its reluctance to force divestiture.[18] Group W suggests that allowing licensees to negotiate to eliminate grandfathered interference rights will serve the public interest by creating an incentive for stations to relinquish this protection, thus bringing more stations into compliance with the Commission's basic allocation principles. Group W pointed to other Commission incentives such as tax certificates that encourage voluntary divestiture of other types of nonconforming stations, and suggested that permitting negotiations to eliminate grandfathered interference rights could present similar opportunities to AM licensees by providing an economic incentive to eliminate interference that is at odds with Commission policy. Group W maintained that the resultant reduction in interference would benefit the public by improving AM service.

26. GSM Media Corporation suggested allowing negotiations that would allow interference to be increased if doing so would lead to additional service in communities and/or areas that need more service. Saga Communications urged the Commission to allow Class II daytime-only stations to provide nighttime service by negotiating with Class I stations to eliminate their extended protection, provided that the nighttime service to be gained from the Class II station would constitute a first, second, third or fourth nighttime service to the community. Crawford Broadcasting Company supported negotiation of interference rights so long as the resultant interference would be limited, thereby assuring the public of reception of a "quality signal".[19] Finally, Karl D. Lahm supported negotiated acceptance of interference based upon the ap-

plication of a public interest test that would ensure that an adequate level of service would be maintained by all areas affected by the agreement.

DISCUSSION

Interference Reduction Efforts

27. As discussed above, the media marketplace has evolved considerably since the Commission first began licensing AM stations. In view of these significant changes, it may be counterproductive for the Commission to deal with the issue of interference solely through a rigid application of its existing regulations. Beyond a certain point, adherence to general rules may result in inefficiencies in spectrum use or, more significantly, a reduced quality of service to the public. On the other hand, it would overtax administrative resources to attempt to achieve greater efficiency, or better "tailoring" of service areas through *ad hoc* adjudications by the Commission. This was amply demonstrated during the period preceding the shift to the present "go-no-go" rules[20], when the Commission engaged in minute scrutiny, often in lengthy, expensive hearings, of claims that proposed new or changed facilities would render service that would more than offset service losses from resultant interference to existing stations. Such laborious case-by-case adjudications demonstrated that this method was not a desirable way to optimize the station assignment process.

28. The Commission has recently undertaken other rule making proceedings to evaluate other technical regulations governing AM stations.[21] Changes such as those proposed in the proceedings addressing calculations in skywave and groundwave field strength and nighttime protection levels will eventually produce improvements in the AM service, but absent other changes, the benefits that can be derived from these proposals will accrue slowly.

29. We believe that it is appropriate at this time to give AM station licensees the opportunity to reduce the amount of interference currently received by implementing certain procedural changes in the processing of applications for facility modifications. Such changes would expand the opportunities to introduce improved technical criteria and allow stations to increase their level of interference protection, and thereby improve the quality and efficiency of AM spectrum use. At this "mature" stage of development of the AM service, a reduction in interference to existing service may be at least as beneficial as the introduction of new service.

30. Therefore, we propose certain changes in our Rules and procedures to encourage AM licensees to institute changes to reduce the amount of interference which has accrued under the current technical rules. While the *AM NOI* originally suggested that the Commission might consider allowing licensees to increase interference by mutual agreement, the commenters have persuaded us to refrain from proposing rules that would permit any increased interference within the protected contours of AM stations. Rather, we limit this proposal to permitting those activities between licensees that would *reduce* interference to one or more stations. Further, we propose to amend certain AM processing Rules to facilitate such efforts to achieve interference reduction between AM stations.

31. As discussed above, many AM stations have voluntarily accepted interference within the nominal contours specified in the Commission's Rules. The Commission granted applications involving such higher levels of interference so long as the applicant demonstrated that it would be able to provide the minimum requisite service to its community of license. Although the station had accepted this level of interference, this decision was based upon the circumstances then in effect. However, many communities may have grown or experienced population shifts. Suburbs may have expanded around the original licensed community. Moreover, FM service now competes for the AM audience and is not as susceptible to interference from the increased level of man-made noise resulting from the proliferation of use of electrical equipment. As a result, AM licensees may not be providing the service originally envisioned when the licensee determined what level of interference that it would accept. As FM and other media services have grown, the competitive position of AM stations has changed markedly. Thus, it may be beneficial to allow some flexibility in the application of our interference standards to allow licensees to adjust to changes in demographics as well as to changes in the broadcast market. This would permit AM licensees to improve service by reducing interference, and, where feasible, allowing stations to provide stronger signals to interstation areas that may need improved service.

32. Therefore, the Commission proposes to permit an AM licensee to reduce the area encompassed by its protected contour for the benefit of reducing interference to another station or otherwise permitting an overall improvement in interference-free service. Licensees reducing their coverage will still be required, however, to meet the city coverage requirements set forth in our rules.[22] Thus, daytime operation must maintain daytime city coverage requirements, and nighttime operations from AM stations other than Class II-S or Class III-S stations must meet nighttime city coverage requirements.

33. Many changes in facilities are already permitted under our current rules. These include reducing power, altering antenna configuration, reducing tower height, or changing antenna sites. The licensee is required to notify the Commission of, and seek approval for, any such changes. Thus, under our current rules, nothing prevents licensees from working cooperatively to reduce interference, nor do the Rules prohibit payment of costs or additional consideration by any licensee in return for such "cooperative" changes. Furthermore, licensees are not required to inform the Commission of any such arrangements -- the licensee is required only to seek approval of the actual changes proposed. Requests for approval of the types of changes discussed above are treated as minor change applications.[23] Even significant reductions in power are currently treated as minor changes, provided that the licensee continues to provide the minimum level of service to its community of license as required by our Rules.[24]

34. Furthermore, under our current Rules, a licensee may even surrender its license for the benefit of reducing interference to another licensee.[25] This could result in overall improved service to the public from the stations remaining on the air because interference from the former station would be eliminated completely. While this could result in a marginal reduction in the number of

AM stations received in a particular area, reducing interference in the congested AM band can lead to improved reception and better overall AM service to the public.

35. When a station surrenders its license, however, it is not deleted immediately from the Commission's records. The Commission has grandfathered the radiation and protection rights of stations that have gone off the air for various reasons by maintaining those rights for a period of one year while accepting applications for a "replacement" station.[26] Adherence to this practice of grandfathering radiation and protection rights of former AM stations, however, sometimes places the Commission in the position of perpetuating AM stations that do not meet our interference criteria. It is our intention to discontinue the practice of grandfathering radiation and protection rights in this manner in the future. The Commission's objective of improving the AM service by reducing interference between stations will be furthered by deleting stations that have surrendered their licenses from the Commission records. New proposals filed subsequent to a deletion will not be permitted to cause prohibited overlap of daytime contours of the remaining stations, and nighttime proposals will be examined based upon the recalculated interference reference (RSS) values for the AM stations remaining on the air.[27] We seek comment upon this proposal. Furthermore, to preserve our options in this regard, the Commission will not accept applications from parties seeking to replace or otherwise utilize the former radiation and protection rights of any station that surrenders its license during the pendency of this rule making proceeding.

Current Impediments to Interference Reduction Efforts

36. There are, however, two significant limitations within our existing Rules and practices that may impede efforts to reduce interference. The first is our present refusal to accept the filing of "contingent applications" -- that is, one or more applications seeking license modifications contingent upon Commission approval of another licensee's request for license modifications -- except under extraordinary circumstances. The Commission has traditionally refused to accept contingent applications because such applications are speculative and unduly impede the introduction of new and modified service by other parties. It may serve the public interest, however, to amend our Rules to allow the Commission to accept routinely a particular category of contingent applications where the proposed changes will result in interference reduction or otherwise permit an improvement in interference-free service. In this manner, licensees can endeavor to improve overall service by coordinating station modifications and having their coordinated efforts reviewed by the Commission simultaneously when determining whether to grant the proposed modifications.

37. We note that we would not expect a widespread occurrence of the use of contingent applications. Given the nature of the AM service, while there may be numerous situations presenting opportunities to reduce interference, we foresee comparatively few instances in which a licensee participating in an interference reduction arrangement could increase its power as a result of another licensee's efforts to reduce interference. We emphasize that this *Notice* does not propose to allow any increased interference to any AM station's protected contour. Thus, while limited opportunities for power increases by an AM licensee may arise if another station reduces power or directionalizes, we expect that the largest number of opportunities for power increases -- and thus the incentive to file a contingent application -- will arise in cases where a licensee surrenders its license altogether.

38. Because of the point-to-point methodology used to calculate RSS values pertaining to nighttime interference, we would anticipate very few opportunities for power increases at night even in the event a station were to go off the air. Upon deletion of the station, we would recalculate the nighttime RSS limits for the AM stations remaining on the air. Subsequently, all stations, including those participating in any contingent arrangements, will be required to comply with the new RSS values.[28] Thus, while practicalities may limit the use of contingent applications to situations involving daytime service, we nonetheless find that they are important. Absent the assurance that the Commission will evaluate contingent applications simultaneously, licensees may not have sufficient incentives to take advantage of interference reduction opportunities. Given the potential for improvement to the overall quality of AM service, we believe that this proposal can provide significant public interest benefits.

39. The second significant limitation in our current Rules is the treatment of applications proposing increases in power as major changes,[29] subject both to the public notice and comment procedures of Section 73.3580 of our Rules, and to competing mutually exclusive applications and petitions to deny. We believe that the public interest is served by requiring that major change proposals comply with the public notice and comment requirements and allow interested parties to file petitions to deny, in accordance with Section 309 of the Communications Act of 1934, as amended. However, the possibility of competing applications may well prevent licensees from participating in the arrangements necessary to create opportunities for improved service. While the public could realize significant benefits from arrangements whereby one station reduces power, thereby reducing interference to a number of AM stations and, in limited circumstances, allowing another station to increase its power to better serve its audience, there is no incentive for such arrangements under our current procedures because the latter station will face potential competing applications when it seeks a power increase. Thus, under our current procedures, there appear to be few instances where two or more licensees could reach an interference reduction arrangement because a third party not participating in such efforts might prevail as a competing applicant.

40. We hereby propose to accept contingent applications from AM licensees seeking to implement interference reduction arrangements. We further propose that if two or more licensees submit contingent applications, the applicant(s) seeking power increases or other modifications that depend upon the contingency as part of the interference reduction arrangement will not be subject to competing applications from third parties with respect to the opportunities created by the contingent arrangements. In this regard, we propose to amend Section 73.3517, which restricts the Commission's acceptance of contingent applications, and Section 73.3571, which governs the processing of AM applications, as specified in Appendix A. In addition, we propose to amend Section 73.1750 to require a licensee that is surrendering its li-

cense pursuant to an interference reduction arrangement contingent upon another licensee's application for modification of facilities, to file a notice of intent to surrender, specifying the contingency, as set forth in Appendix A. We seek comment upon the proposed amendments.

41. Under the changes proposed above, the Commission would not examine third party proposals filed after the contingent applications by other parties that would not protect the currently authorized facilities of the contingent applicants, because to do so would interfere with the operation of the AM marketplace without compensating benefits to the public. Rather, the Commission proposes to review the terms and conditions of specific contingent applications for construction permits for facility modifications to determine whether grant of the contingent applications is in the public interest. To the extent that any of the contingent applications proposes a major change as defined in our Rules, the public will have the full opportunity to comment. While the Commission will consider objections to the proposed modifications raised by any comments, whether or not some alternative license modification proffered by a third party would confer greater public benefits will not be considered in the contingent application process. The Commission's determination of whether to grant the contingent applications will be based solely upon the issue of whether the public interest benefits to be gained by the proposals justify the requested modifications.

42. We believe that ample legal authority exists that supports the proposed amendments. The Commission is authorized to limit eligibility for applications seeking to utilize broadcast frequencies.[30] Because the channels involved in contingent application proposals are entitled to protection, they are not otherwise available for application by others. Thus, opportunities on these channels only arise if an existing licensee is persuaded to relinquish its protection, but this would only occur if the parties involved can be assured that they will benefit from the proposed modifications and that both applications will be granted. If one contingent applicant would withdraw in the face of any competing applications, both applications would be withdrawn. Any frequency untilization opportunities would disappear and other interested parties would have no comparative application rights pursuant to Section 309 of the Act, and therefore, the rule of *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), does not apply.

43. This analysis is analogous to that set forth by the Commission when it amended its Rules to provide a procedure that allowed the Commission to modify the licenses or permits of FM stations through Rule Making proceedings amending the FM Table of Allotments. Section 73.202(b) of the Rules, where the modifications would occur on mutually exclusive, higher class adjacent or co-channels.[31] Such modifications are permitted regardless of the availability of additional equivalent higher class channels. In cases involving such proposed modifications, the Commission ruled that it would not entertain the filing of expressions of interest by other parties, reasoning that allowing the filing of potential competing applications would inhibit FM licensees from proposing upgrades that would be beneficial to the public.

44. There, as in the instant situation, the Commission found that licensees seeking to enhance service on co- or adjacent channels would generally withdraw their requests rather than risk the loss of existing authorizations, as well as the expense and delay of a comparative hearing. The Commission found that *Ashbacker* was not controlling in such cases because the channels proposed for upgrades were precluded by existing operations and were thus unavailable for application by others, making the *Ashbacker* rule inapplicable.

45. Similarly, the analysis set forth above is somewhat analagous to that utilized by the Commission to support commercial-noncommercial channel exchanges without subjecting either existing licensee to competing applications.[32] We believe that the use of contingent applications filed by AM licensees presents a similar situation in which the Commission is authorized to limit eligibility for applications for a specified frequency use. We seek comment upon these analogies.

Local Service Floor

46. The changes to Commission Rules and practices outlined above could provide important opportunities for licensees to obtain reductions in current interference levels, provide for more uniform coverage, and generally improve the quality of AM service. We recognize, however, that such changes carry with them certain implications with respect to the provision of local service. Thus, we believe that it may be desirable to develop a mechanism for ensuring that modifications do not result in a loss of local service that would be detrimental to the public interest. Therefore, we propose to establish a "service floor" -- a level of service that must be maintained subsequent to any changes in facilities.

47. We seek comment upon the appropriate parameters of such a service floor. For example, we seek comment upon whether the service floor should be defined solely in terms of reception of services *(i.e.,* the number of stations a listener can still receive), or whether the Commission should also consider transmission service *(i.e.,* the number of other stations licensed to a community losing a local station). We note that the Commission has traditionally been most concerned with first and second full-time aural services. An appropriate floor may be established in the form of a requirement that licensees not create any new "white" or "grey"[33] service areas.[34] Or, some other limitation may be more appropriate, such as prohibiting licensees from eliminating any third or fourth service, similar to the suggestions provided in the comments filed by Saga Communications and those of Karl D. Lahm. We also seek comment upon whether other services such as commercial FM services should be taken into account when determining whether the services available to a community meet the service floor.

48. A licensee seeking to reduce its service area would file an application with the Commission for a construction permit to modify its facilities. This application may be filed alone, or in conjunction with one or more other contingent applications. In any case, such an application could include a certification by the applicant(s) that the level of service provided to the area(s) that may experience reduced service would not fall below the service floor described above. Alternatively, the applicant could be required to include an exhibit consisting of contour maps documenting that the requisite number of signals would continue to be available to the areas affected by the interference reduction. Applications meeting this test and that are otherwise acceptable would be granted.

49. In all other respects, applications for modifications to facilities, whether single or contingent, will be processed in the usual manner at the Commission. Once an

application for modification of facilities for one or more licensees has been granted, the information used to calculate the interference protection ratios for the affected stations is automatically modified in the Commission's records to reflect the changes in facilities. Any future applicants for new or modified services will be required to protect the remaining stations to the recalculated interference protection level.[35] Thus, the increased protection derived from any interference reduction will automatically be enforced by application of the Commission's current procedures.

ADMINISTRATIVE MATTERS

50. Authority for the rule changes upon which comments are invited is contained in Sections 4(i), 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, and 307.

51. Pursuant to the applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **May 8, 1989,** and reply comments on or before **May 23, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive personal copies of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

52. For the purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice stating that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever comes first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence for the resolution of issues in the proceeding. Section 1.1203.

53. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1201(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

54. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IFRA is attached as Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest oif the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall cause a copy of this *Notice of Proposed Rule making*, including the Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act, Pub.L. 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.*,(1981).

55. The proposal herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain new or modified form, information collection and/or recordkeeping, labeling, disclosure, or record retention requirements. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

56. For further information on this proceeding, contact Diane L. Hofbauer, (202) 254-3394.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 73 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

57. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

58. It is proposed to amend §73.1750 to add the following language at the end:

§ 73.1750 Discontinuance of operation.

* * * If a licensee surrenders its license pursuant to an interference reduction arrangement, and its surrender is contingent upon the grant of another application, the licensee surrendering its license must identify in its notification the contingencies involved.

59. It is proposed to amend §73.3517 by adding new paragraph (c) to read as follows:

§ 73.3517 Contingent applications.

* * * * *

(c) Upon payment of the filing fees prescribed in §1.1111 of this chapter, the Commission will accept two or more applications filed by existing AM licensees for modification of facilities that are contingent upon each other, if granting such contingent applications will reduce interference to one or more AM stations or will otherwise improve interference-free service. The applications must state that they are filed pursuant to an interference reduction arrangement and must cross-reference the other contingent applications.

60. It is proposed to amend §73.3571 by adding new paragraph (c)(1) to read as follows:

§ 73.3571 Processing of AM broadcast station applications.

* * * * *

(c) * * *

(1) In order to grant major change applications made contingent upon the grant of another licensee's request for a facility modification, the Commission will not consider mutually exclusive applications by other parties that would not protect the currently authorized facilities of the contingent applicants. Such major change applications remain, however, subject to the provisions of §§73.3580 and 1.1111. The Commission shall grant contingent requests for construction permits for station modifications only upon finding that such action will promote the public interest, convenience and necessity.

* * * * *

APPENDIX B

REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

I. Reason for Action:

In this proceeding, we seek public comment upon a proposal to develop a formal procedure for AM licensees to reduce interstation interference and to consider certain changes in our AM processing rules that would facilitate such a procedure.

II. Objective:

This proposal is intended to reduce congestion in the AM band and thus improve the overall quality of the AM service.

III. Legal Basis:

Sections 4(i), 303 and 307 of the Communications Act, as amended, 47 U.S.C. §§154(i), 303 and 307.

IV. Description, Potential Impact, and Number of Small Entities Affected:

There are approximately 5000 AM broadcast stations in the United States, many of which may be able to take advantage of the procedures proposed herein. In addition, all could benefit from the anticipated reduction in the overall level of interference.

V. Reporting, Record Keeping, and other Compliance Requirements:

In order to effectuate any interference reduction efforts, the licensees involved would be required to obtain approval of proposed service changes from the Commission by filing an application for modification of facilities.

VI. Federal Rules that Overlap, Duplicate or Conflict with Proposal:

There is no overlap, duplication or conflict.

VII. Any Significant Alternatives Minimizing Impact on Small Entities and Consistent with Stated Objectives:

There are no significant alternatives available.

FOOTNOTES

[1] *Review of Technical Assignment Criteria for the AM Broadcast Service*, MM Docket No.87-267, 2 FCC Rcd. 5014 (1987).

[2] Throughout all periods of the day, AM stations transmit signals that travel in two directions -- signals that travel parallel to the surface of the earth, or "groundwaves", and signals that travel upward, away from the transmitter, or "skywaves". During the day, skywave signals are absorbed in the lower portion of the ionosphere in what is called the "D" layer. Groundwave signals thus predominate during daytime hours and their propagation is affected by frequency and the soil conductivity along the propagation path. Co-channel stations can be located reasonably close together without experiencing daytime interference because skywaves are not contributing to interference. At night the "D" layer disappears, and skywave signals are reflected from a second layer in the ionosphere and can thus be propagated hundreds of miles from the transmitter. Such enhanced nighttime propagation allows a station to provide skywave service over hundreds of miles, but also increases the possibility of interference over even greater distances.

[3] The 107 AM channels were divided into three groups of channels: clear channels, regional channels and local channels. Four basic classes of stations evolved to operate on these three channel groups. Class I and Class II stations operate on clear channels. Class I stations provide extensive primary (groundwave) service during the day and night, with skywave service during nighttime hours generally extending out to 750 miles or more from the transmitter. Class II stations protect the Class I station on the channel and provide primary service only, the area of which depends upon station location, power and frequency. Class III stations represent an intermediate category

and operate on regional channels, providing primary service to larger cities and the surrounding rural areas. Class IV stations operate on local channels and provide primary service to a community and the immediately contiguous suburban or rural areas surrounding it. *See* 47 C.F.R.§§73.21-37, 73.182.

[4] *See Report and Order* in BC Docket No. 80-90, 94 FCC 2d 152 (1983), *recon. denied*, 49 Fed. Reg. 10260 (March 20, 1984); *see also Implementation of BC Docket No. 80-90*, 100 FCC 2d 1332, 1340-1378 (1985).

[5] *See First Report* in Gen. Docket No. 84-467, 50 Fed. Reg. 33844 (August 21, 1985); and *Second Report* in Gen. Docket No. 84-467, 51 Fed. Reg. 8706 (March 13, 1986); *Fourth Notice of Inquiry* in Gen. Docket No. 84-467, FCC No. 88-72 (released June 3, 1988).

[6] *AM Report* at 82.

[7] Group W Comments at 2.

[8] There are differences in the contours to be protected. During the day, Class I stations receive co-channel groundwave protection to their 0.1 mV/m contour, while other stations are protected to their 0.5 mV/m contour. At night, Class I stations (other than Class I-N) receive co-channel protection to their 0.5 mV/m 50% skywave contours, while Class I-N stations are protected to their 0.1 mV/m 50% skywave contours. For Class II and Class III stations, nighttime protection is provided to a specified groundwave contour, (which can vary from 0.5 mV/m in the case of Class II-A to 10 mV/m in the case of Class II-C) or to a contour of a higher value if the station's service is already limited by interference from other stations. The rules also set forth adjacent channel protected contours for the various classes of stations. Finally, as discussed below, there are important differences in how daytime and nighttime interference calculations are made.

[9] *See* 47 C.F.R. §73.37(a).

[10] *See* 47 C.F.R. §73.37(b).

[11] *See, Notice of Proposed Rule Making: Review of the Methods for Calculating Nighttime Protection for Stations in the AM Broadcast Service*, FCC 88-327, 53 Fed. Reg. 47235 (November 22, 1988).

[12] *See* 47 C.F.R.§73.182.

[13] *See* 47 C.F.R.§73.182.

[14] 47 C.F.R.§73.182(l).

[15] 47 C.F.R.§73.182(l)(1). This is commonly referred to as the "fifty per cent exclusion rule".

[16] Thereafter, of course, other stations were required to provide protection to this station in accordance with the Commission's Rules.

[17] The Commission bifurcated the inquiry proceeding and established separate filing periods for different sections of the AM NOI. *Order*, DA 87-1823, released December 15, 1987. Phase I of the comment period involved Sections II (Additional Assignment Considerations) and III (Related Technical Issues). Phase II involved Sections I (Technical Assignment Principles) and IV (Antenna Systems).

[18] Comments of Group W (Phase I) at 8.

[19] Comments of Crawford Broadcasting Company (Phase I) at 8.

[20] 47 C.F.R. §§73.37(a) and (b). The "go-no-go" rules rigidly proscribe the overlap of prescribed field strengths. Section 73.37(a) establishes the permitted overlap of contours between protected and interfering stations. Section 73.37(b) permits a proposed new or modified daytime facility to receive overlap up to the 1.0 mV/m contour under specified circumstances to allow flexibility for provision of service to communities and areas lacking aural services.

[21] *Improved Methods for Calculating Groundwave Field Strength in the AM Broadcast Band*, FCC 88-326, 3 FCC Rcd. 6577 (1988); *Improved Methods for Calculating Skywave Field Strength in the AM Broadcast Band*, FCC 88-324, 53 Fed. Reg. 45948 (November 15, 1988); *Review of the Methods for Calculating Nighttime Protection for Stations in the AM Broadcast Service*, FCC 88-327, 53 Fed. Reg. 47235 (November 22, 1988).

[22] *See* 47 C.F.R.§73.24.

[23] *See* 47 C.F.R. §73.3571. A significant distinction between minor change applications and major change applications is that the latter are subject to the public notice provisions of §73.3580, as well as the petition to deny procedures afforded by §309 of the Communications Act of 1934, 47 U.S.C. §309.

[24] However, we note that existing Class II-S and Class III-S stations are exempt from the city coverage and minimum operating schedule requirements. We further note that in *Enhanced Nighttime Operation for Class II-S and Class III-S AM Radio Broadcast Stations*, FCC 88-325, released November 4, 1988, the Commission sought comment upon permitting full-time stations to employ voluntary nighttime power reductions, even to levels below the current established minimum power of 0.25 kW. We proposed that stations reducing their nighttime power below 0.25 kW would be reclassified as Class II-S or Class III-S and would lose their interference protection rights.

[25] Currently, any station may surrender its license without obtaining Commission approval to do so -- it merely notifies the Commission that it is relinquishing its frequency. 47 C.F.R. §73.1750. However, as detailed below, a change in the current Commission procedure is required if this approach is to offer a feasible method of reducing interference. *See* Appendix A.

[26] *See, e.g., Lorraine Broadcasting*, 88 R.R. 2d 985,987 (1966).

[27] *See* 47 C.F.R.§73.182.

[28] *See also Review of the Methods for Calculating Nighttime Protection for Stations in the AM Broadcast Service*, FCC 88-327, 53 Fed. Reg. 47235 (November 22, 1988).

[29] *See* 47 CFR §73.3571(a)(1).

[30] *See, Storer Broadcasting v. FCC*, 351 U.S. 192 (1956); *Malrite of New York, Inc.*, FCC 84-338, released July 31, 1984.

[31] *Modification of FM Broadcast Licenses to Higher Class Co-channels or Adjacent Channels*, MM Docket No. 85-313, 51 Fed. Reg. 20290 (June 4, 1986).

[32] *See Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations*, FCC 87-117, 51 Fed. Reg. 15628 (April 25, 1986).

[33] A "white area" is an area that receives no full-time aural service. A "grey area" receives one full-time aural service.

[34] Case law suggests that the Commission is precluded as a legal matter from allowing creation of any white or grey areas. *See, e.g., Hall v. FCC*, 237 F.2d 567 (D.C. Cir. 1956); *TV Corp of Michigan v. FCC*, 294 F.2d 730 (D.C. Cir. 1961); *West Michigan Television v. FCC*, 460 F.2d 883 (D.C. Cir. 1971).

[35] *See* 47 C.F.R. §73.182 for calculation of RSS values.

CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

Re: Policies to Encourage Interference Reduction Between AM Broadcast Stations

Generally, I support issuing the *Notice of Proposed Rule Making* because it has the potential for reducing interference in the AM Band. My support, however, is tempered by several issues that are raised in this proceeding.

As the item correctly notes, the proposal has significant implications for our localism policies as established by Section 307(b) of the Act. We must make sure that service to local communities is not reduced to the point where a community is underserved. Second, the procedural mechanisms contained in the proposal could lay the foundation for a system of negotiated interference rights. I would like commenters to address these specific issues.

On balance, the benefits of potential reduced interference justify issuing a *Notice of Proposed Rule Making*. I intend to examine this issue closely.

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Policies Regarding Interference Between AM Broadcast Stations.

By now, the facts about AM's decline are familiar. AM's share of the radio audience has fallen from 73 percent in 1973 to 37 percent in 1983 to 25 percent today. Because the Commission has authorized so many AM stations, interference is a serious problem, especially at night. Class IV and other low-powered AM stations have an especially difficult time reaching their whole markets.

The FCC cannot "save" AM in a single proceeding, nor should we attempt to help AM by handicapping its competitors. We can, however, try to create conditions in which AM stations have an opportunity to compete effectively.

This notice addresses some AM problems by making it easier to reduce interference on the AM band. By accepting contingent applications, we would give stations more flexibility in adjusting their service areas. By deleting radiation and protection rights for stations that go dark, we would finally end our counterproductive practice of licensing replacement stations not meeting our current interference criteria.

These two proposals could gradually lead to a less cluttered AM dial. Listeners could benefit from the emergence of more high-power AM stations that have the facilities to cover an entire market and the resources to compete effectively.

Despite these potential benefits, our proposals carry some risk. We may be giving some stations an incentive to cut back service or, in extreme cases, to shut down altogether. Therefore, my support for this rulemaking is based on three safeguards. First, this item does not contemplate "negotiated interference." No station will be allowed to modify its facilities unless the change complies with the Commission's interference rules. Second, we will continue requiring every station to provide a city-grade signal to its community of license. Finally, we are considering limiting stations' flexibility by adopting a local service floor. The idea is to deny contingent applications if the effect would be to reduce service to a community that has little service. I look forward to reviewing comments on whether we should adopt this last safeguard and, if so, how stringent it should be.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-388

In the Matter of
Amendment of the Commission's
Rules for Rural Cellular Service

THIRD REPORT AND ORDER

Adopted: April 21, 1988; Released: May 18, 1988

By the Commission:

INTRODUCTION

1. On November 7, 1986, we released a *Further Notice of Proposed Rule Making* (Further Notice) in CC Docket No. 85-388, Amendment of the Commission's Rules for Rural Cellular Service, 1 FCC Rcd 499 (1986). In this Further Notice, we proposed to amend the rules concerning partial settlements, multiple ownership, and transfers of interests in Rural Service Area (RSA) applications and authorizations.[1]

BACKGROUND

2. Our proposals stemmed from our experience processing applications for cellular markets 91-305 and more specifically in markets beyond 120.[2] For these markets, we were flooded with applications by applicants who immediately after filing their applications entered into partial settlements.[3] Our concern arose from an assessment that permitting partial settlements encouraged the filing of applications by speculators who had no interest in actually constructing and operating a cellular station.[4] Many applicants entered into partial settlements agreeing to dilute their ownership interests if they became tentative selectees in return for a less than 1% interest in other markets if another member of the settlement group were to become a tentative selectee there. Some members of settlement groups later sought to divest their interests prior to the grant of a construction permit. In several MSA markets, parties filed petitions to deny alleging that tentative selectees were not the real parties in interest in their applications. The transfer requests and petitions to deny delayed issuance of authorizations.

3. We therefore proposed to prohibit all pre-filing, post-filing and post-grant partial settlements among competing non-wireline RSA applicants. We did not propose to eliminate partial settlements or cumulative chances for wireline applicants, because we did not receive applications from apparent speculators on the wireline side and wireline applicants frequently reached full market settlements. In addition, we proposed to continue to permit full settlements because they simplify and expedite the licensing process.

4. We also proposed to prohibit wireline and non-wireline applicants from holding or acquiring *any* interest in more than one application in the same RSA, including interests of less than 1%, except for permissible interests in publicly-traded corporations. The current 1% exception has been used by application promoters and applicants as the basis for forming post-filing, pre-lottery partial settlements or "alliances." We tentatively concluded that the ability to sell, trade or transfer minority interests in cellular licenses encouraged the speculative filing of applications and abuses of our cellular licensing process. In addition, the large number of applications and the resulting alliances have contributed to the filing of numerous transfer of control applications by applicants and permittees that sought to cash in their interests. The processing of these transfer requests has consumed staff time and resources and has delayed service to the public.

5. Therefore, we proposed to prohibit the sale, transfer, assignment or other alienation of any interest in a cellular RSA application, permit or license until the facility has been placed in operation. We believed that this step would deter insincere applicants that have no intention of building and operating a cellular system from speculating in unbuilt and new facilities.

6. Finally, we proposed to allow, prior to the start of operation, barters and transfers of interests in construction permits in partial or whole RSAs. Such exchanges were contemplated to permit the consolidation of RSAs to form more economically viable service areas. We invited comment on the latitude that should be allowed lottery winners to engage in a barter and exchange process.

7. We do not intend to prevent any qualified applicant with an interest in being a cellular operator from filing an application. We recognize that permitting transferability of cellular licenses can lead to faster service to the public. We made the proposals with the express purpose of deterring insincere applications, the handling of which caused appreciable delays in the licensing process. By adopting the proposals as modified herein,[5] we seek to promote a regulatory environment in which the applications filed reflect a genuine intention to construct and operate the cellular facilities as proposed.

COMMENTS AND DISCUSSION

Partial Settlements

8. Most of the 19 comments and 15 reply comments[6] were filed by potential applicants and associations representing members who may be applicants. A large number of the commenters support the proposal to ban partial settlements as a way of reducing processing delays from a high volume of applications. *See* comments of Brazoria; BellSouth; Pactel; reply comments of McCaw. McCaw states that partial settlements caused processing delays in 4th round markets (No. 91 to No. 120) where some non-wireline tentative selectees withdrew from settlement partnerships with resulting protracted disputes that delayed service. *See American Cellular Network Corp. of Nevada*, 60 Rad. Reg. 2d (P&F) 1460 (1986); *order on review* 2 FCC Rcd 4530 (1987). McCaw also argues that the mere process of notifying the Commission of partial settlements has caused confusion and inconvenience.

9. Other commenters, including those who generally support the proposal, express concern that a ban on partial non-wireline settlements may not deter the filing of

speculative applications. D.B. Communications asserts that knowledgeable cellular investors will still invest -- even if that means filing for all markets -- to be in a position to barter for applications in desired markets. D.B. claims that our newly imposed fee for cellular applications, coupled with the fact RSA systems will require large upfront investments of capital for construction and will not yield a return for several years, will deter speculation. D.B. estimates that 50 percent fewer applications will be filed for RSAs than were filed MSA markets beyond 120. Finally, D.B. argues that we should parallel our policies of the 4th Round cellular markets and allow applicants to form joint ventures for cost and management benefits and to receive cumulative chances.

10. Some commenters contend that the restrictions on settlements and multiple ownership should apply uniformly to non-wireline and wireline applicants. For example, McCaw asserts that since the number of applications filed have increased for wirelines and non-wirelines alike, a prohibition directed only at non-wirelines is inappropriate and discriminatory. McCaw also complains that exempting wirelines from the ban will undermine the competitive position of non-wirelines and accelerate wireline headstarts.

11. Wireline entities oppose universal application of the proposed restrictions. (Ardmore/United, BellSouth, Brazoria.) They emphasize that wirelines should not be subject to any restriction on partial settlements or cumulative chances, because no abuse of the Commission's processes by wirelines has been shown. Rural Cellular, Inc. submits that wirelines have historically operated within a particular area in providing landline service and will be applying in the corresponding RSA. Rural Cellular, Inc. asserts that the likely result of this is that partial settlements will lead to full settlements for the wireline applicants in an RSA and that settlement groups will be *bona fide*.

12. Several commenters suggest alternative means of deterring speculative applications. (BellSouth, McCaw, Metro Mobile, Telocator, ALLTEL Reply, CTIA Reply) In their view, stricter qualification standards would be more effective than prohibiting partial settlements in eliminating or reducing speculative filings. One recommended step is to broaden the applicability of the firm financial commitment which we now require an applicant to demonstrate after it becomes the tentative selectee.[7] For example, McCaw argues that requiring all RSA applicants to demonstrate a firm financial commitment at the application stage would be effective in discouraging the filing of speculative applications. Metro Mobile suggests that we require RSA applicants to demonstrate a firm financial commitment conditioned upon grant of a construction permit. ALLTEL asserts that requiring such a commitment would insure that all RSA applicants are *bona fide*. In addition, Telocator maintains that the lack of an FCC imposed spectrum price, processing fee or a performance bond encourages a speculative environment. McCaw suggests revising the RSA application fee. BellSouth submits that we should require evidence beyond financial and technical data which shows that applicants are committed to providing cellular service, but does not specify what this evidence should be.

13. Metro Mobile suggests adopting specific requirements to deter speculation. The first suggestion is that we require each RSA applicant to submit engineering exhibits prepared exclusively for its use. According to Metro Mobile, this would ensure that only serious applicants apply and would prevent the filing of mass marketed applications, as occurred in the MSA filing rounds. Second, Metro Mobile requests that we require RSA applicants to make a showing of good cause for amendments to specify alternative cell sites or face dismissal of their applications. Applicants would be encouraged to obtain reliable cell sites and to build the exact system proposed. Metro Mobile's third recommendation is to amend the rules to require applicants to certify that neither they nor any individual related to them by blood, marriage, or current or prior employment has an interest in another RSA application for the same market.

14. After weighing and evaluating all of the comments and reply comments, we adopt the proposal to ban partial settlements for non-wireline carriers as proposed. With 428 defined RSAs,[8] as compared to 185 MSA markets beyond market number 120, a significantly greater number of applications for RSAs are likely to be filed under the current rules and guidelines than were filed for these MSAs. Given our previous experience, if we continue to allow partial settlements for non-wireline carriers, we believe that large numbers of applications will be filed by people who are not *bona fide* applicants but who seek to become parts of settlement groups or alliances for speculative purposes.

15. We have concluded, after carefully reviewing all comments filed in this proceeding and our experiences in processing the approximately 100,000 MSA applications, that prohibiting non-wireline partial settlements would be in the public interest. In earlier rounds, we allowed partial settlements because we expected them to reduce litigation and expedite cellular service to the public. In permitting these settlements, we stressed that applications should be filed by *bona fide* applicants who certified their intention to construct and operate cellular systems to serve the public. Subsequently, however, our experience in processing applications for markets 91-305 has convinced us that partial settlements increase litigation and delay the issuance of construction permits. Moreover, many of the applicants who entered into partial settlements did not appear to be *bona fide* applicants seeking to become independent licensees. In several markets, the selectee, as majority partner in the settlement group, requested transfer prior to the grant of the permit. Other applicants entered into option agreements whereby they would divest their ownership interest if they won the lottery. In addition, applications associated with settlement groups generated petitions to deny that raised questions of whether the tentative selectees were the real parties in interest in their applications. Some petitions alleged that the applicant was merely a passive investor with no intent to construct and operate a cellular system. Real party in interest questions resulted in the designation of one hearing involving five MSA markets. While these petitions were ultimately denied, service to the public was significantly delayed while the hearing was pending. Delay due to the need to resolve real party in interest issues occurred in several other markets as well. In some cases, we have asked the Department of Justice to consider whether criminal violations involving real party in interest questions have occurred. These are still pending.

16. We have also found that settlement groups create several problems because of the large numbers of minority partners.[9] First, we have received numerous letters from minority partners seeking help in mediating disputes

with a winning applicant concerning the rights and obligations that flow from a settlement agreement.[10] Second, when a majority partner transfers its ownership interest in the construction permit or license, the purchaser frequently has difficulty even ascertaining all minority interests in the company it has acquired. Third, we have received at least one request from a winning applicant to review the qualifications of its minority partners.[11] Finally, we received transfer of control and assignment requests from tentative selectees arguing that the transfer should be approved because the large number of partners in the partial settlement prevents effective management of the enterprise.

17. In short, we conclude that non-wireline partial settlements have created more problems than they have solved. In markets 31-90, partial settlements led to full market settlements; however, once the number of applications reached the level at which full market settlements became nearly impossible, the usefulness of partial settlements was far outweighed by the problems they caused. They have slowed the processing of applications and delayed initiation of service. Also, they have extended the headstart enjoyed by the wirelines in many markets. Moreover, partial settlements make filing applications more attractive to those who wish only to speculate in a cellular system. We hope to dissuade speculators from filing by prohibiting partial settlements. Applicants who do not intend to construct and operate a cellular facility should not apply.

18. However, we also conclude that the prohibition against partial settlements should not apply to wireline applicants. In the previous cellular filing rounds, there has been no problem regarding the sincerity of wireline applications. There is no evidence to suggest that the wirelines were filing applications to enter partial settlements merely for the purpose of speculation. Further, the commenters have not shown, nor do we have evidence to indicate, that the wirelines would likely file speculative applications for RSAs and abuse the lottery selection process. We do not anticipate any problem in their entering into partial settlements for several reasons. Unlike most non-wireline applicants, the wirelines are already in the telephone business and have *bona fide* business reasons for providing cellular service to their landline subscribers. Moreover, small wirelines must comply with state certification requirements to serve particular areas. As a result, the number of wireline applicants for most RSAs will be fixed and small. Because of this factor, a significantly fewer number of wireline applications than non-wireline applications will be filed per market; and therefore, we agree with Rural Cellular, Inc. that partial settlements among wireline applicants could reduce the number of competing applications and possibly lead to full settlements and would not be a source of abuse.

19. We disagree with McCaw's claim that exempting the wirelines from the partial settlement ban will exacerbate the headstart problem. As discussed above, we have concluded that the non-wireline partial settlement ban will result in the more rapid grant of non-wireline construction authorizations. We do not believe that exempting the wirelines from the ban will substantially change the time it takes to process a wireline application. However, even if McCaw's claim were accurate, we do not believe that it would be in the public interest to ban wireline partial settlements to mitigate this problem. We believe that our existing petition to defer process represents a better way to deal with this problem.[12]

20. In addition, we decline to adopt proposals by parties to require stricter filing standards and higher application costs. Metro Mobile's suggestion that we require each applicant to submit an exclusive engineering proposal would have the impractical effect of unreasonably raising the costs to apply while not necessarily improving the quality of the application. Similarly, its proposal for requiring a good cause showing for amendments to specify alternative cell sites would likely result in parties filing opposition pleadings and would delay implementing RSA cellular service. Also, we do not adopt its recommendation to prohibit applicants who are related from filing applications in the same RSA. Because such a measure is beyond the scope of the our proposals in this Rule Making, we believe that it is not proper to impose a family or employment relation test. In any case, although applications from members of the same family in one market may prompt real party in interest allegations, we can not assume that these relationships necessarily violate real party in interest principles.[13] Moreover, we believe that modifications to our RSA certification rules, which we adopt today in a concurrent proceeding, are sufficient to address Metro Mobile's concerns.[14]

21. Contrary to the comments of D.B., we do not believe that RSA capital requirements and delayed return on investment coupled with the RSA filing fee requirement will deter the filing of speculative applications. We observe that the capital outlay required to construct systems for markets beyond 120 did not deter speculative filings of applications in those markets. With regard to D.B.'s assertion that we would receive 50% fewer applications for the RSAs than we received for the MSAs, we note that we accepted applications for two MSAs, Hagerstown and Cumberland, Maryland, after the conclusion of the earlier filing round. We received approximately 1600 applications for each of these MSAs which is almost twice the average number of applications that we received for any other MSA. This high rate of filing occurred despite the fact that these MSAs were the first two markets in which the applicants were required to pay the $200 filing fee.[15] It thus does not appear that the imposition of the $200 filing fee has caused a significant reduction in the number of applications filed.[16] Nor does it appear that there will be a significant reduction in the number of applications filed because of the smaller sizes of the RSA markets. These MSAs (#257 and #269) are among the smaller MSAs and are smaller than many RSAs.

Multiple Ownership

22. Our current multiple ownership rules prohibit a cognizable ownership in more than one application per market but interests of less than 1% are not deemed cognizable (except for interests in publicly-traded corporations, *see* Section 22.921, in which interests of less than 5% are not deemed cognizable). We proposed to prohibit multiple ownership interests in applications in any one market, even if that ownership interest is less than one percent, except for interests in publicly-traded corporations. Certain parties, including Pactel, support the proposal on the ground that it will simplify application processing and review. McCaw points out that the 1% exception served as a catalyst for many partial settlements and, therefore, any rule provision on multiple ownership

should reflect partial settlements. Ardmore/United and NCTA oppose the proposed rule, arguing that it will delay implementation of service to rural areas and prevent many small, privately held companies from applying for RSAs. Clifton Forge notes that common ownership among small independent wirelines within a particular region is not unusual, since shareholders may invest in several companies close to each other. Commenters note that some independent wirelines may own stock in other independent wirelines, but not exert managerial control. Clifton Forge asserts that, under the proposed rule, small wirelines which operate as distinct and separate companies having a small percentage ownership interests in other small wirelines would have to request waivers to file applications.

23. The small wirelines argue that any restriction on multiple ownership should not apply to them. (Ardmore/United, Clifton Forge, NCTA, Dean Hill.) Clifton Forge argues that the number of wirelines in any given service area is fixed and not subject to manipulation, because a wireline must be state certified in that service area to be eligible for filing. Finally, McCaw and Cellular, Inc. favor an exception for an applicant which is a subsidiary of a publicly-traded company or a publicly-traded company which is a member of an applicant partnership. Cellular, Inc. asserts that publicly-traded companies frequently file applications as members of partnerships or through subsidiary corporations. It contends that the proposed rule does not make clear that such entities are the equivalent of publicly-traded applicants. Cellular, Inc. requests that the exception also apply to interests in any applicant which are held through a publicly-traded entity and that there is no requirement for the actual cellular applicant itself to be publicly-traded; that is, if a publicly-traded company creates a wholly-owned subsidiary to apply for a cellular authorization, the exception should apply to such a subsidiary.

24. We amend our rules to prohibit non-wireline RSA applicants from having *any* ownership interest, including those of less than 1%, in more than one application in a market. The 1% exception provided a basis in many markets for hundreds of applicants to enter partial settlements or alliances and then, if they became tentative selectee, to dilute their interests pursuant to the agreements that they signed with marketeers of applications.[17] Parties filed petitions to deny alleging that such tentative selectees were not the real party in interest in their applications. Those petitions delayed the authorizations.[18] Therefore, consistent with our ban on non-wireline partial settlements, we find no justification for retention of the multiple ownership exception for the non-wireline applicants. However, for the same reasons stated above for excluding wireline applicants from the partial settlement prohibition, we see no need to eliminate the less than 1% rule for those applicants. It is clear from the comments we have received, that wireline companies are structured in such a way that elimination of the 1% rule would bar many of them from filing. It is not our intent to prohibit any qualified applicant from filing an RSA application and we will not, therefore, eliminate the less than 1% exception as it applies to wireline applicants.

25. With regard to publicly-traded companies, the Further Notice proposed to retain the exception for publicly-traded companies and the comments filed do not persuade us to make any changes to it. We are satisified that the current provisions of Section 22.921 concerning publicly-traded companies are sufficient.[19] We clarify that under Section 22.921, a publicly-traded company may file a cellular application in a market through a wholly-owned subsidiary or as part of a partnership with a non-publicly-traded entity and that an applicant that holds less than a 5% interest in the publicly-traded company will not be precluded from filing its own application in the same market. In addition, we recognize that the corporate relationships that many wireline companies have either with each other or with a publicly traded-company have been in existence for a long time. We believe that Section 22.921, as amended herein, will not have an adverse impact on these wireline companies in applying for RSAs, because they are still allowed to enter partial agreements and to receive cumulative chances in a lottery.

Transfers of Interests

26. In the Further Notice, we proposed a prohibition on the sale, barter, transfer, assignment, or other alienation of any interest in an RSA application until after the facility has been placed in operation. Many of the commenters oppose the adoption of this proposal. (BellSouth, Pactel, NTCA, Ameritech, Metro Mobile, New Vector, Telocator.) Pactel recommends prohibiting the transfer of 50% or more of an RSA application, permit or license. Pactel asserts that the economic viability of an RSA is tied to its relationship with the adjacent RSA/MSA and that it is logical for RSA permittees to offer a partnership interest in a system to MSA/RSA operators because of the community of interest factor which exists between an RSA and a contiguous MSA. Many of the commenters support a rule which provides for such consolidation to form regional systems that can be constructed and operated with certain economies of scale. (Pactel, Mayaguez, Metro Mobile, Telocator.) These commenters argue for a liberal rule on transfers and barters. BellSouth argues that the transfer prohibition as proposed will impede the rapid, efficient provision of service because it will prevent the transfer of licenses which may be neccessary because of unforeseen events before commencement of operations. McCaw contends that it is not possible to determine whether arbitrarily defined, politically based RSA boundaries actually correspond to areas of demand at this time. McCaw argues that a flexible barter policy would allow economically depressed RSAs to be consolidated with economically viable ones, such as those with significant interstate traffic. McCaw opposes any limitation on transfers of interests in authorizations of unconstructed RSAs. This latitude, it asserts, would permit the bartering of interests in authorizations in RSAs for interests in unconstructed MSA systems and involve the RSA selectee in the construction and operation of such an MSA system. McCaw argues that such bartering would deter applicants from speculating in unbuilt cellular facilities by holding them to the obligation of participating in the construction and operation of a cellular system. McCaw also asserts that since the Commission has endorsed cash in trades of ownership interests,[20] cash also should be permitted as an element in the RSA/MSA barter process. For these and other reasons, several commenters maintain that our existing anti-trafficking rules, Sections 22.920 and 22.40, and their flexible application offer better means of controlling speculation than our proposals.

27. Mayaguez maintains that adjacent MSAs and RSAs should be exempted from the proposed prohibition on transfers in order to eliminate conflict between the objec-

tives of deterring speculative filings and expediting service to the public. Mayaguez asserts that the current trend among wirelines, including the Bell Operating Companies and GTE, is towards regional systems. According to Mayaguez, a regional system is more efficient for small markets because a single switch allows common operation in a region and travel across MSA/RSA boundaries without disconnection between different systems. Mayaguez also refers to regional economies of common operation and management, contending that the costs to set up a team of personnel to serve an area of 150,000 are the same as for an area of 300,000. Without a provision for the formation of regional systems, Mayaguez argues that it would be impossible for non-wirelines to be competitive with wirelines. Thus, Mayaguez concludes that there should be an exemption for non-wirelines seeking to form regional systems. Pactel agrees, contending that we should modify our proposal for barters and transfers to include MSAs along with RSAs. Cellular Telephone Company maintains that if we do not impose any restrictions on acquiring interests in authorizations to serve adjacent non-MSA counties, it will enable non-wirelines to compete better with regional wireline systems.

28. New Vector argues that free transferability allows the party that is most interested in constructing and operating to do so. New Vector asserts that market forces and anti-trafficking rules are incompatible. It maintains that if the ownership and future boundaries of RSA systems are going to be determined by economic forces, the Commission should not follow the pretense that only sincere, non-speculative applications may be filed. While New Vector observes that a strict prohibition on transfers would discourage speculation, it argues that any exception, such as barters, would undermine the effect of a strict policy. New Vector asserts that the Commission should either adopt free or no transferability; a middle ground would fail. New Vector advocates allowing assistance in construction, financing, and other aspects of cellular operations yet eliminating the economic incentives for trafficking. In New Vector's view, elimination of speculative applications requires explicit rules addressing (a) contracts or options for future sales, (b) construction service contracts, (c) financing by potential buyers, and (d) other future interests in a permittee's system. Such a plan would include issuing cease and desist orders against violations of the rules adopted.

29. After carefully considering the arguments the commenters have presented concerning our proposal, we have concluded that it would not be in the public interest to prohibit the sale, barter, transfer, assignment or other alienation of any interest in an RSA authorization prior to the time the facility is placed in operation. We agree with those commenters who argue that the adoption of such a policy would unnecessarily limit the ability of MSA licensees and RSA grantees to construct regional cellular systems made up of existing MSA systems and either all or a portion of planned RSA systems.[21] We also recognize that despite our efforts to align the RSA boundaries as closely as possible with regional economic boundaries, there will be many cases in which further adjustments will be necessary. For example, in some cases it may be more feasible to divide one of the RSAs into two separate service areas, each of which would be operated as a part of a different MSA system. For these reasons we conclude that the continued flexible application of Section 22.40 (b) to transactions involving construction authorizations for unbuilt facilities would better serve the public interest than our original proposal would. For this reason we are not changing our existing policy concerning such transactions.[22]

30. While we find that it is in the public interest to continue to allow flexibility regarding transactions in construction authorizations, other factors come into play regarding applications. Allowing the transfer, assignment, or other alienation of pending applications delays service to the public. When a pending application is assigned or transferred, a new public notice must be issued and the application processing cycle is restarted. This results in the disruption of orderly processing, slows the initiation of service to the public, and is not in the public interest. For these reasons we are amending our rules to prohibit the alienation of any interest in an RSA application prior to the grant of a construction authorization.

PROCEDURAL MATTER

31. Contel Cellular Inc. has requested a declaratory ruling in the form of a public notice that applicants not be required to respond to Item 18 of Form 401.[23] They claim that responding to this item is overly burdensome on applicants who hold other Part 22 applications, permits, and licenses within 40 miles of the cellular system for which they are applying. A reply to Item 18 has been required for all non-cellular applicants to determine if the applying entity was requesting additional frequencies through other business affiliations without adequate justification. Since this consideration is not applicable to cellular applicants, we no longer require cellular applicants to complete this item.

REGULATORY FLEXIBILITY ACT - FINAL ANALYSIS

32. *Need for and Purpose of Rules.* This action is expected to deter speculative applications and promote efficient and expedient authorization of cellular licenses in the RSAs and lower the administrative costs associated with the process of granting licenses in these RSAs.

33. *Issues Raised by the Public in Response to the Initial Analysis.* None.

34. *Alternatives that Would Lessen Impact.* We have considered alternative approaches for the filing of RSA cellular applications. *See e.g.* note 7, *supra*. We have found no specific alternatives which will allow for equally predictable and efficient licensing of cellular service in RSAs.

ORDERING CLAUSES

35. Authority for this Rule Making is contained in Sections 1, 4(i) and (j), 301, 303 and 309 of the Communications Act of 1934, as amended.

36. This document has been analyzed with respect to the Paperwork Reduction Act of 1980 and found not to be subject to that Act.

37. WHEREFORE, for the foregoing reasons set forth in response to the comments and reply comments filed in this proceeding, IT IS ORDERED, that Part 22 of the Rules IS AMENDED as discussed herein and as specified in the Rules Section appended to this order. These rules and other policies adopted in this Order will become effective 30 days from publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX A

RULES SECTION

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 22 - Public Mobile Service

1. The authority citation continues to read:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended (47 U.S.C. 154, 303).

2. Section 22.33 (b)(2) is revised to read as follows:

Section 22. 33 Grants by random selection.

* * * * *

(b) * * *

(2) Markets Beyond the Top-120 and Rural Service Areas. In markets beyond the top-120 cellular modified Metropolitan Statistical Areas and in Rural Service Areas, the cumulative lottery chances described in paragraph (b)(1) of this section will be awarded to joint enterprises resulting from partial settlements among mutually exclusive wireline applicants only. Any joint enterprise resulting from a partial settlement among mutually exclusive non-wireline applicants for markets beyond the top-120 Metropolitan Statistical Areas will not be entitled to any cumulative lottery chances. Partial settlements among non-wireline applicants for Rural Service Areas are prohibited.

* * * * *

3. Section 22.921(b) is revised to read as follows:

Section 22. 921 Ownership in applications for cellular service for markets below the top - 90.

* * * * *

(b) Markets beyond the top-120 and Rural Service Areas.

(1) General. Except as otherwise provided herein, no party may have an ownership interest, direct or indirect, in more than one application for the same MSA or NECMA market, except that interests of less than one percent will not be considered. For Rural Service Areas, no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, including an interest of less than one percent. No party to a wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, except that interests of less than one percent will not be considered.

(2) Ownership interests in publicly-traded corporate applicants. Notwithstanding paragraph (b)(1) of this section, no party may have an ownership interest, direct or indirect, in mutually exclusive applications filed by publicly-traded corporations for an MSA market, a non-MSA/non-NECMA area, or a Rural Service Area, except that interests of less than five percent will not be considered.

* * * * *

4. Part 22 is amended by adding a new Section 22.922 to read as follows:

Section 22. 922 Transfers and assignments of applications, permits or licenses in Rural Service Areas.

(a) Notwithstanding any other section of this Part, the sale, transfer, assignment or other alienation of any cellular application to offer service to Rural Service Areas is prohibited prior to the grant of a construction authorization. This restriction on transfers of interests in such cellular applications shall include any form of alienation, including option arrangements and agreements, as well as equity and debt placement plans.

APPENDIX B

Comments

Ameritech Mobile Communications (Ameritech)

Amery Telephone Company, Baldwin Telecom, Inc., and Hammond Telephone Company

Ardmore Telephone Company and United Telephone Company (Ardmore/United)

BellSouth Mobility, Inc. (BellSouth)

Brazoria Telephone Company, Inc., Fairmount Telephone Company, Inc., Fidelity Telephone Company and Murdocksville Independent Telephone Company (Brazoria)

Cellular, Inc.

Cellular Telephone Company

Clifton Forge Telephone Company (Clifton Forge)

D.B. Communications (D.B.)

GTE Mobilnet, Inc. (GTE Mobilnet)

Kadison, Pfaelzer, Woodard, Quinn & Rossi

Mayaguez Telephone Company (Mayaguez)

McCaw Communications Companies, Inc. (McCaw)

Metro Mobile CTS (Metro Mobile)

National Telephone Cooperative Association (NTCA)

Pactel Cellular (Pactel)

Rural Cellular, Inc.

Telecator Network of America - Cellular Telecommunications Division (Telocator)

U S West NewVector Group, Inc. (NewVector)

Reply Comments

ALLTEL Mobile Communications, Inc. (ALLTEL)

Ardmore Telephone Company and United Telephone Company

BellSouth Mobility, Inc.

Cellular Telecommunications Industry Association (CTIA)

Cellular Telephone Company

Contel Cellular, Inc.

Dean George Hill, PC (Dean Hill)

Mayaguez Telephone Copmpany

McCaw Communications Companies, Inc.

Metro Mobile CTS

National Telephone Cooperative Association

Pactel Cellular

Telecator Network of America - Cellular Telecommunications Division

The Cellular Corporation - filed informal comment

U S West NewVector Group, Inc.

FOOTNOTES FOR APPENDIX B

[1] The Lists in this Appendix contain those commenters and reply commenters who address and raise matters within the scope of the proposals (excluding the three procedural matters) on which we invited comment in the *Further Notice*. The Lists also include parties who filed informal comments and comments on pertinent matters in CC Docket No. 85-388 as noted herein.

[2] Name of Commenter has changed to Bryan, Cave, McPheeters, and McRoberts.

ATTACHMENT A

Companies Filing Waiver Petitions

November 1, 1988

ALLTEL Illinois, Incorporated (Alltel)[1]

The Ameritech Operating Companies (Ameritech)

Bay Springs Telephone Company, Incorporated, Elkhart Telephone Company, Merrimack County Telephone Company, Granite State Telephone, and Taconic Telephone Corporation (Bay Springs)

The Bell Atlantic Telephone Companies (Bell Atlantic)[2]

The BellSouth Telephone Companies (BellSouth)

Central Telephone Company (Centel)

Chillicothe Telephone Company (Chillicothe)

Cincinnati Bell Telephone Company (CBT)

Contel Corporation (Contel)

The GTE Telephone Operating Companies (GTOC)

Lincoln Telephone and Telegraph Company (Lincoln)

Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West)[3]

Nevada Bell[4]

The New York Telephone Company and the New England Telephone and Telegraph Company (NYNEX)

Pacific Bell (Pacific)[5]

Rochester Telephone Corporation (Rochester)

The Southern New England Telephone Company (SNET)

Southwestern Bell Telephone Company (SWB)[6]

Telephone Utilities Exchange Carrier Association (TUECA)

The United Telephone System Companies (United)

Vista-United Telecommunications (Vista)[7]

FOOTNOTES FOR ATTACHMENT A

[1] Also filed application for review.

[2] Bell Atlantic filed a supplemental petition on November 10, 1988, to allow for the rate structure changes necessary to implement a general offering of DS3 services in its annual 1989 access tariff filing.

[3] US West filed a supplemental petition on November 10, 1988, to allow for the rate structure changes necessary to implement a general offering of DS3 services in its annual 1989 access tariff filing.

[4] The Nevada Bell petition is identical to the Pacific petition, except for a few additions. Those additions only are mentioned in this Order; all waiver requests attributed to Pacific apply to Nevada Bell as well.

[5] The waiver petition filed November 2, 1988. Pacific also filed a petition for reconsideration.

[6] SWB filed a supplemental petition on November 10, 1988, to allow for the rate structure changes necessary to implement a general offering of DS3 services in its annual 1989 access tariff filing.

[7] Vista requests a waiver of the requirements of MTS and WATS Market Structure, Docket 78-72, Phase I, FCC 85-149, released April 23, 1985 *(April 23 Order)*, and Tariff Revisions Filed by the National Exchange Carrier Association and Various Bell Operating Companies, Memorandum Opinion and Order, FCC 85-6564, released August 23, 1985 *(August 23 Order)*. Although it does not specifically reference the 1989 TRP, the issues raised by Vista are best addressed in this proceeding.

ATTACHMENT B

Companies Filing Comments or Oppositions to Waiver Petitions

November 14, 1988

American Telephone and Telegraph Company (AT&T)

The Ameritech Operating Companies (Ameritech)

The Bell Atlantic Telephone Companies (Bell Atlantic)

MCI Telecommunications Corporation (MCI)

The National Exchange Carrier Association (NECA)

ATTACHMENT C

Companies Filing Reply Comments

November 18-25, 1988

The Ameritech Operating Companies (Ameritech)

The Bell Atlantic Telephone Companies (Bell Atlantic)

Cincinnati Bell Telephone (CBT)

The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West)

Nevada Bell[1]

Pacific Bell (Pacific)

Rochester Telephone Company (Rochester)

Southern New England Telephone Company (SNET)

Southwestern Bell Telephone Company (SWB)

The United Telephone System Companies (United)

FOOTNOTES FOR ATTACHMENT C

[1] The Nevada Bell reply is identical to the Pacific reply in most respects and thus all reply comments attributed to Pacific apply to Nevada Bell as well.

FOOTNOTES

[1] The current rules allow partial settlements, multiple ownership interests of less than 1%, and certain transfers of interest.

[2] We refer to these markets as metropolitan statistical areas (MSAs).

[3] By "partial settlement," we mean any arrangement among fewer than all of the applicants in a market that provides any reciprocal interests in the applications of the parties to the arrangement. The term includes the so-called "alliance agreements" whereby each participant in the alliance agrees that if it wins a particular market it will retain at least 50.1% of the application and that the other members of the alliance will each obtain a maximum interest of 0.99% in the winning application.

[4] Applications were mass marketed and made available free or at a modest price to people with little or no interest in providing cellular service.

[5] *See* Appendix A for amended rule sections.

[6] *See* Appendix B for a list of the Parties. In referring to the commenters, we are abbreviating their names. Their full names are listed in this Appendix.

[7] *See* Section 22.917 (b) (1) of the Rules. The firm financial commitment is currently required from the tentative selectee, the surviving applicant in a full market settlement, and any unopposed applicant for the initial authorization. However, on February 19, 1988, we released a Third Notice of Proposed Rule Making, 53 Fed. Reg. 5020 (1988), to require a firm financial commitment of all applicants at the time they file their application. That proposal was adopted for all non-wireline RSA applicants on April 21, 1988. *See* Amendment of the Commisson's Rules for Rural Cellular Service, CC Docket 85-388, FCC 88-154, (Fourth Report and Order).

[8] *See* Amendment of the Commission's Rules for Rural Cellular Service, CC Docket No. 85-388, FCC 88-156, adopted April 21, 1988, (*Further Order on Reconsideration),* at para. 15.

[9] Non-wireline partial settlement groups included from 20 to over 300 minority partners.

[10] We are aware of at least two cases in which the minority partners are engaged in civil litigation with the majority partners to solve these disputes. Such activity clearly takes time and resources from grantees that we believe could be put to better use constructing the proposed system and providing service to the public.

[11] *See,* American Cellular Network Corporation "Petition for Section 403 Inquiry," *re* application of Ellis Thompson, File No. 14261-CL-P-134-A-86, for Atlantic City, New Jersey MSA.

[12] A petition to defer is a request for a brief moratorium on wireline service. Where a non-wireline tentative selectee can demonstrate that early entry by a wireline would not be in the public interest, we will consider the request for such a brief moratorium pursuant to the guidelines we have enunciated. *See Cellular Communications Systems*, 89 FCC 2d 58, 74-75, at n.32 (1982); *Cellular Communications Systems*, 86 FCC 2d 469, 491, at n.57 (1981).

[13] We have stated that family or close personal relationships do not automatically create a presumption of control for purposes of real party in interest considerations. *Virginia Communications, Inc.*, 62 Rad. Reg. 2nd (P&F) 1001, 1010 (1987). *See Florida Cellcom*, 2 FCC Rcd 7044 (Com. Car. Bur., 1987).

[14] We require all RSA applicants to make the following certification:

> I also certify that the applicant is the real party in interest in this application and there are no agreements or understandings, other that those specified in this application, which provide that someone other than the applicant shall have an indirect or direct ownership interest.

See Section 22.923 (b)(7) as adopted by *Further Order On Reconsideration.*

[15] *See* Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, *Report and Order*, 2 FCC Rcd. 947 (1987).

[16] A larger filing fee would probably reduce the number of RSA applications filed. However, the fee is set by Congress. *See* Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, Section 5002 (a); Communications Act of 1934 (47 U.S.C. 151 *et seq.*), Section 8(b)(1), as amended. The fee can only be increased in accordance with the procedure set by Congress based on a change in the Consumer Price Index (CPI).

Id. The Commission is required to notify Congress of any adjustment based on this procedure before it becomes effective. *Id.* We note, however, that an increase in the fee due to a change in the CPI probably would not be large enough to make a difference in the number of applications filed.

[17] *See* paras. 2, 16, and 17, *supra*.

[18] The 1% exception may have caused additional delays by enabling losing applicants to speculate in minority non-cognizable interests. *See* para. 4, *supra*.

[19] *See Further Notice*, *supra* at n.5. We recently have modified Section 22.921 to prohibit ownership of more than a five percent interest in a corporation for active investors and adopted the use of a multiplier to determine attribution in ownership chains.

[20] *See Public Notice*, Report No. CL-86-99, "Guidelines for Settlements and Changes in Ownership of Cellular Systems," released March 24, 1986; *Cellular Lottery Rule Making*, 98 FCC 2d 175, 217, at note 113 (1984).

[21] *See* Comments on Certain Proposed Rural Service Area Definitions and Request for Clarification filed by GTE Mobilnet to *First Report and Order*, CC Docket No. 85-388, 51 Fed. Reg. 26895 (1986). GTE requests clarification of whether we would issue more than one station authorization to carriers desiring to serve separate areas of a RSA. Multiple applications for an RSA will be considered as mutually exclusive. However, full market settlements contemplating the grant of more than one application in the RSA will be permitted. Parties to full market settlements may partition the RSA into segments. Each party to such a full market settlement will become a licensee of a particular segment within an RSA. In addition, if an applicant wishes to apply for separate areas in the same RSA it may do so; this must be done in one application. In such a case separate construction authorizations will be issued for each area.

[22] All grantees seeking authority to transfer or assign an authorization for an unconstructed facility must make the showing required by Section 22.40 (b) that they "(have) not acquired (the) authorization . . . for the principle purpose of profitable sale rather than public service." When a construction authorization is tranferred or assigned, the expiration date of the authorization does not change and will be extended only in very limited circumstances.

[23] Item 18 of Form 401 asks, "Is applicant directly or indirectly, through stock ownership, contract, or otherwise currently interested in the ownership or control of any other licensed radio stations or pending applications for radio stations under Part 22 within 40 miles of the station applied for here? (*See* Sections 22.13 (a) of FCC Rules and Regulations.)" If applicant's answer is affirmative, the item requests additional information.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-2
Phase II

In the Matter of

Filing and Review of
Open Network Architecture Plans

MEMORANDUM OPINION AND ORDER

Adopted: November 17, 1988; Released: December 22, 1988

By the Commission: Commissioner Dennis concurring and issuing a statement.

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I. INTRODUCTION

1. On February 1, 1988, pursuant to the requirements of our *Computer III* proceeding,[1] AT&T filed an Open Network Architecture (ONA) plan (AT&T's plan), which it amended on March 10, 1988, to comply with requirements of the *Phase II Reconsideration*. Six parties filed comments on the Plan.[2] In this order, we approve AT&T's plan, subject to the conditions described below.

II. BACKGROUND

2. In the summer of 1985, we initiated our *Computer III* proceeding [3] to undertake a broad reexamination of the regulatory framework for enhanced services adopted in *Computer II* [4] and related proceedings. The *Phase I Order* in the *Computer III* proceeding concluded that structural separation requirements for enhanced services impose significant costs on the public in decreased efficiency and innovation that outweigh the benefit of those requirements in limiting the ability of AT&T and the Bell Operating Companies (BOCs) to engage in anticompetitive behavior. We found that nonstructural safeguards can effectively preclude anticompetitive behavior and improper cost shifting to regulated services. We retained the two service categories first established in *Computer II*: basic services, which are subject to common carrier regulation under Title II of the Communications Act of 1934 (the Act), and enhanced services, which are not subject to such regulation.[5]

3. The *Phase I Order* replaced structural separation for the enhanced service operations of AT&T and the BOCs with a set of nonstructural safeguards.[6] As a precondition to full structural relief for their entire enhanced services operations, we required AT&T and the BOCs to implement approved ONA plans to be filed February 1, 1988, and file cost allocation plans in compliance with the *Joint Cost Order* [7] requirements.[8] Under the ONA regime adopted in the *Phase I Order*, AT&T and the BOCs were required to unbundle their basic services, provide them to enhanced service providers (ESPs) and others on an "equal access" basis, and conform to certain pricing requirements. As an interim measure, prior to our approval of the ONA plans, we permitted AT&T and the BOCs to offer individual enhanced services on an unseparated basis pursuant to the Comparably Efficient Interconnection (CEI) requirements described in the *Phase I Order*.

4. Upon reconsideration, we revised the AT&T ONA requirements. We found that AT&T's participation in the competitive market for interexchange basic services distinguishes it from the BOCs for purposes of our ONA policies.[9] We concluded that the competitive nature of the interexchange basic service market provides an important assurance that access to those services will be open to enhanced service providers, and we also found that much of the basic service information of greatest use to enhanced service providers is controlled by local exchange carriers (LECs), such as the BOCs, and not by interexchange carriers like AT&T.[10] Thus, AT&T is not required to implement the type of unbundling required in the *Phase I Order* for ONA, but may instead rely on service-specific CEI plans for its enhanced service offerings.[11] We required AT&T to file a modified ONA plan, describing the manner in which it plans to respond to the needs of enhanced service competitors for equal and efficient access to its basic services.[12] We also directed AT&T to describe: (1) its capabilities available to transport the basic service functions (*e.g.*, signaling and call status information) associated with certain ONA services of the BOCs or other LECs; (2) its arrangements for providing such transport in a nondiscriminatory manner; and (3) its procedures for responding to requests of the BOCs and other LECs for new forms of transport for other basic functions.[13]

5. In addition to establishing this modified ONA requirement, we also required AT&T to describe its implementation of CEI and the other nonstructural safeguards for the enhanced services it now offers using facilities that are not collocated with basic service facilities, pursuant to the conditions of the *AT & T Limited Waiver Order*. Finally, we held that, even after we approved its ONA plan, we would require AT&T to file a service-specific CEI plan for each AT&T enhanced service that uses facilities collocated or otherwise integrated with basic service facilities.[14] We reaffirmed these modified *Computer III* requirements for AT&T in the *Phase I Further Reconsideration*.[15]

6. The *Phase II Order* in *Computer III* [16] reaffirmed our treatment of protocol processing as an enhanced service[17] and adopted specific CEI requirements to ensure that AT&T and the BOCs will provide efficient, nondiscriminatory, unbundled access to their basic service facilities for competitors to provide enhanced services that include protocol processing.[18] The *Phase II Order* also required AT&T and the BOCs to file reports demonstrating that those carriers are not discriminating against their ESP competitors either in the timing of installation and maintenance, or in the quality and reliability, of basic services provided to them.[19] We established rules requiring AT&T and the BOCs to inform ESPs of new or modified network services,[20] and we adopted detailed requirements governing those carriers' treatment of proprietary information derived from customer use of basic network services (CPNI).[21]

III. EQUAL AND EFFICIENT ACCESS TO BASIC SERVICES.

7. The *Phase I Reconsideration* required AT&T's plan to describe the manner in which it intends to respond to the needs of ESPs for equal and efficient access to its basic services.[22] We stated that AT&T's plan should describe the basic services and functions that AT&T now offers and plans to offer to ESPs.[23]

A. *AT & T's Plan*

8. AT&T asserts that its tariffs offer an expansive menu of basic services as well as a broad range of optional features and functions that are available in conjunction with these services,[24] and it attaches copies of tariffs describing the terms and conditions under which it provides several such services.[25] AT&T provides detailed discussions of its 800 service,[26] ACCUNET T1.5 service,[27] ACCUNET Packet Service (APS),[28] and DATAPHONE Digital Service (DDS).[29] It states that the backbone of its future open network architecture will be an Integrated Services Digital Network (ISDN).[30] AT&T describes new features that it plans to offer using ISDN capabilities, including call-by-call service selection,[31] switched digital capabilities at high data transmission rates,[32] and calling station identification.[33] AT&T states that these capabilities will support interexchange applications of ONA services to meet the needs of ESPs that are directly connected to AT&T's network. AT&T asserts that after necessary interface standards have been established and implemented for Common Change Signaling System #7 (CCS7)[34] network interconnection between AT&T and LECs, it will be able to offer the same capabilities to customers, including ESPs, that connect first to a LEC's network.[35]

9. AT&T further asserts that it has extensive internal procedures to ensure that all of its customers, including ESPs, have equal and efficient access to its network services.[36] It claims that its service provisioning procedures

are highly mechanized, providing service on a first-come, first-served basis, and that it does not gather or possess information regarding which of its customers are providing enhanced services.[37] AT&T also describes the various forms of market research and customer contact by which it learns the needs of large customers, including ESPs.[38]

B. ***Positions of the Parties***

10. IBM says that AT&T does not offer ESPs access to its current signaling capabilities and diagnostic information, even though ESPs and other users require such capabilities in the management of their systems.[39] NCR makes a similar argument and asserts that no technical reasons prevent AT&T from offering such services in conjunction with all of its offerings.[40]

11. AT&T replies that it is not obligated to unbundle its diagnostic and signaling capabilities, for the same reasons that the Common Carrier Bureau (the Bureau) has cited in the *Transaction Services Order* in concluding that AT&T is not obligated under our CEI requirements to unbundle, or offer separately, the interoffice data transmission trunks used in APS.[41]

C. ***Discussion***

12. We agree with AT&T that, under its modified ONA obligations, it is not required to unbundle its diagnostic and signaling capabilities and offer them separately under tariff.[42] The *Phase I Reconsideration* found that AT&T's participation in the competitive market for interexchange basic service distinguishes it from the BOCs for purposes of imposing ONA requirements.[43] We found that, in contrast to the local service franchises accorded to most BOCs, the major markets in which AT&T participates are all open to competition. On that basis we concluded that we would not mandate for AT&T the type of unbundling required of the BOCs.[44] We recognized, however, that competition in the interexchange basic service market is not perfect, and we emphasized that the CEI requirements for specific enhanced services continue to apply to AT&T.[45] This means, among other things, that AT&T must offer diagnostic and signaling capabilities to others on the same basis that it provides such services to its own enhanced service operations. Because AT&T has demonstrated that it complies with this requirement and has stated that it will continue to do so, we approve this portion of its plan.

IV. AT&T'S CAPABILITIES FOR PROVIDING INTEREXCHANGE TRANSMISSION OF BOC ONA SERVICES

13. The *Phase I Reconsideration* required AT&T to describe, in its ONA plan, its capabilities for transmitting the CEI/ONA signaling and call status information needed for communications among BOCs operating under different ONA plans.[46] Noting that AT&T is a major provider of the basic services that will be used to transmit such information among the BOCs, we stated that transparent transmission of such information is critical to the efficient operation and uniformity of ONA on a national scale.[47]

A. ***AT & T's Plan***

14. AT&T asserts that it will continue to offer its existing interexchange transmission services on a nondiscriminatory basis,[48] and it describes its efforts to develop new transmission capabilities to support ONA services, including consultations with the BOCs and major ESPs.[49] AT&T notes, however, that none of the BOCs provided AT&T with a final list of ONA services, or their technical characteristics, before the deadline for filing the AT&T ONA plan.[50] It emphasizes that the interLATA[51] application of ONA services will depend upon the BOCs providing such services in federal access tariffs.[52] However, AT&T states that it has examined a list of 118 network capabilities that ESPs have asked the BOCs to provide,[53] and it concludes that approximately 40 percent of those items could have interexchange applications.[54] Of those applications, it says, AT&T could provide interexchange transport of information associated with ONA services for more than half, using existing technology and with modifications to existing administrative and tariff processes.[55] AT&T states that its ability to provide interexchange transmission is constrained by the BOCs' current limited ability to transmit and accept the necessary information at network interfaces.[56] The best remedy for that problem will be for the BOCs to deploy CCS7 and for AT&T to complete its implementation of CCS7 network interconnections, it says, because it would be just as expensive and time-consuming to implement changes in the existing system of interconnection, which is less flexible and has fewer capabilities than CCS7.[57] Consequently, says AT&T, it would make no sense to expend resources to develop further the capabilities of the existing inband signaling system.[58] Despite those limitations of existing network technology, AT&T describes how it could transmit information for 18 ONA services that it says would be involved in the interexchange provision of automatic number identification (ANI),[59] message waiting indication,[60] multiplexed data-over-voice (DOV) channels,[61] and augmented versions of call forwarding.[62]

15. AT&T says that it will have fully deployed CCS7 in its switched network in 1990.[63] If the BOCs and other LECs deploy CCS7-compatible systems, adds AT&T, it will be able to provide interexchange transmission of such information as call setup; call progress (*e.g.*, ringing, answer, busy, disconnect);[64] ANI with additional capabilities for billing and caller privacy;[65] nature of connection indicators; forwarded-call indicators; calling party's category; user service information; called party number; originating line information; and user-to-user information.[66] AT&T states that all of the BOCs are evaluating plans for CCS7-compatible signaling network deployment, but that it is not aware of firm or specific timetables for CCS7 network interconnection by the BOCs. [67]

B. ***Positions of the Parties***

16. Telenet construes AT&T's plan as admitting that AT&T's network lacks the current capability to transmit signaling information that might be offered as part of ONA services by the BOCs, and that such a capability will not exist until there is wide-scale implementation of ISDN, or until both AT&T and the BOCs have implemented CCS7.[68] Telenet notes that AT&T projects that it will have fully implemented CCS7 in 1990,[69] but it expresses dissatisfaction with AT&T's admission that it is unable to predict when the BOCs will deploy CCS7, or even whether the BOCs will deploy it at all.[70] Telenet

concludes that, because we have recognized that the transparent transmission of such information is critical to the efficient operation and uniformity of ONA on a national scale,[71] it would be premature to eliminate our structural separation requirements before that capability is in place.[72]

17. AT&T replies that, in demonstrating in its plan that it is capable of providing interexchange transmission of signaling information associated with 18 potential ONA services, it did not imply that it was incapable of handling transmission for additional ONA services.[73] AT&T argues that Telenet has not identified any specific interexchange applications of ONA services that AT&T could not accommodate.[74]

C. ***Discussion***

18. We approve this section of AT&T's plan. AT&T's efforts to identify ONA services for which it can provide transmission of signaling information indicate that the network can presently support a range of useful ONA services, including ANI and DOV. Even though interexchange transmission of signaling apparently can be improved significantly with the introduction of such capabilities as CCS7, we see no reason to halt the ONA process and reject AT&T's plan, as Telenet suggests, until those capabilities are fully deployed through the national network. As we have stated in the *Computer III* proceeding, ONA implementation is not an event, but an evolutionary process that will continue as new network technologies are deployed. It was not our intent in establishing our ONA policies to reject as inadequate *bona fide* efforts to effectuate those policies through current network technologies. The *BOC ONA Order*, [75] adopted today, notes that the BOCs' initial sets of ONA services consist predominantly of services based on existing network capabilities. Subject to some conditions, we have approved the BOCs' implementation of such services. Similarly, we believe that AT&T's plan adequately demonstrates its ability to provide interexchange transmission of the signaling associated with the initial ONA services of the BOCs. While we have no reason to doubt AT&T's technical judgment that, generally speaking, the most cost-effective way to provide interexchange transmission of ONA signaling information would be through CCS7, rather than through patchwork alterations to more primitive signaling systems, we expect AT&T and the BOCs to continue to work together to achieve technical solutions, when practicable, to specific ONA signaling needs or problems prior to full deployment of CCS7.[76]

V. NONDISCRIMINATORY INTEREXCHANGE TRANSMISSION OF LEC ONA SERVICES

19. The *Phase I Reconsideration* noted that because AT&T is increasingly a competitor of the LECs, AT&T has some incentives for discrimination against them.[77] Accordingly, we required AT&T to describe how it would avoid unfair discrimination in its provision of interexchange transmission service for the signals and information associated with LEC ONA services.[78]

20. The *Phase I Reconsideration* also clarified that AT&T and the BOCs need only address the requirements of ESPs in designing unbundled basic services for service-specific CEI plans.[79] However, we stated that such basic offerings, when tariffed at the federal level, must be available to any customer for any use.[80]

A. ***AT & T's Plan***

21. AT&T asserts that all of its tariffed features and functions are available to all customers, including ESPs, on a nondiscriminatory basis,[81] and it attaches supporting tariffs.[82] It also asserts that an essential attribute of AT&T's current and future network architecture is the use of published interfaces that ensure compatibility between AT&T premises products and services, as well as those of other vendors that comply with the technical specifications of those interfaces.[83]

B. ***Positions of the Parties***

22. No parties comment on this section of AT&T's plan.

C. ***Discussion***

23. After reviewing AT&T's plan and the supporting tariff pages that it attaches to its plan, we conclude that this section of AT&T's plan complies with our *Computer III* requirements.

VI. PROCEDURES FOR RESPONDING TO REQUESTS FOR NEW FORMS OF ONA TRANSMISSION

24. The *Phase I Reconsideration* required AT&T to describe its procedures for responding to requests of the BOCs and other LECs for new forms of transmission for signals and information associated with new ONA services.[84]

A. ***AT & T's Plan***

25. AT&T states that it has proposed to the BOCs that AT&T will use an existing mechanism, the "New Services Access Process," as the model for responding to ESP requests for new AT&T interexchange services, and that the BOCs generally support that proposal.[85] It states that the New Services Access Process was developed after divestiture to expedite the flow of requests for access and other networking needs between AT&T and the LECs.[86] In this context, it says, the LECs would approach AT&T on behalf of ESPs to discuss the nature of the ESPs' new service needs.[87] AT&T provides a description of the typical scenario under which proposed new services would be evaluated and developed.[88]

B. ***Positions of the Parties***

26. No parties comment on this section of AT&T's plan.

C. ***Discussion***

27. We agree with AT&T that it would be appropriate to use an existing process that has worked well in the past as a framework for dealing with BOC requests for new forms of interexchange transmission related to ONA services. We therefore approve this section of AT&T's plan.

VII. TREATMENT OF ENHANCED SERVICES THAT ARE NOT COLLOCATED WITH AT&T BASIC SERVICE FACILITIES

28. The *Phase I Reconsideration* permits AT&T to provide enhanced services from facilities that are not collocated with basic network facilities under the terms of the *AT & T Limited Waiver Order*, which treats such noncollocated enhanced services facilities as customer premises equipment (CPE) for regulatory purposes and uses essentially the same nonstructural safeguards as specified for AT&T's CPE operations in the *AT & T Structural Relief Order*. [89] We replaced the conditions of that waiver with the nonstructural safeguards for enhanced services adopted in the *Computer III* proceeding by requiring AT&T to comply with the our CEI requirements and other nonstructural safeguards, which include the cost allocation procedures of the *Joint Cost Order* and safeguards in the *Phase II Order* regarding network information disclosure, nondiscrimination reporting, and CPNI.[90] We required AT&T to describe in its ONA plan its implementation of those safeguards for the enhanced services addressed in the *AT & T Limited Waiver Order*. [91] Approval of AT&T's implementation of such safeguards means that AT&T can continue offering all such services on a noncollocated basis without filing CEI plans for individual noncollocated services.[92]

29. According to its plan, AT&T offers three noncollocated services pursuant to the *AT & T Limited Waiver Order*: AT&T Mail, Transaction Services, and Speech Response.[93] It claims that its provision of "both its current [citation omitted] and all future external services complies fully" with the CEI requirements and the other nonstructural safeguards.[94]

A. *CEI Requirements*

30. We designed our CEI requirements to give enhanced service providers equal and efficient access to those basic services that AT&T and the BOCs would use in providing their own enhanced services. The *Phase I Reconsideration* emphasized that the standard for evaluating CEI compliance is based on "equal access" which will be interpreted in a "reasonable and efficiency-promoting manner."[95] This standard does not require absolute technical equality, but rather seeks to achieve fairness and efficiency for all enhanced service providers competing with a carrier. Factors used to evaluate whether the standard has been met include the absence of systematic differences between basic service access provided to the carrier's enhanced service operations and to others, end-user perception of equality, and utility to other enhanced service providers -- that is, whether any technical disparity makes a difference in the ability of competitors to provide their enhanced services.[96]

1. *Unbundling and Resale of Basic Services*

31. The *Phase II Order* determined that protocol processing should continue to be treated as an enhanced service[97] and that, when protocol processing is offered by AT&T or a BOC, the carrier must satisfy specific CEI requirements in order to provide efficient, nondiscriminatory, unbundled access to its basic service facilities necessary for competitors to provide enhanced services that include protocol processing.[98] We specifically directed AT&T to implement these requirements by offering to others, at the same tariffed rates it charges its own enhanced service operations, the digital transmission capabilities that underlie its enhanced services that provide protocol processing.[99] We held that AT&T must take such services and facilities that it uses for its own enhanced services at the standard tariffed rates that it charges to others.[100]

32. In contrast, because of the BOCs' control over local basic service facilities, we subjected their protocol processing operations to more detailed requirements than those applied to AT&T,[101] based on the conditions we had applied earlier in the *Asynchronous/X. 25 Waiver Order*.[102] Those conditions include a requirement that the BOCs apply tariffed rates to the interoffice channels related to the provision of packet service by the BOC or by unaffiliated ESPs.[103]

a. *A T & T's Plan*

33. AT&T asserts that the only basic services used by AT&T Mail, Transaction Services, and Speech Response are provided both to AT&T's enhanced service operations and to unaffiliated ESPs under separate tariffs, and that it will continue this policy for all of its external enhanced services.[104] To the extent that it establishes any new basic services for a given external ESP, AT&T adds, it will make them available, under tariff, to unaffiliated ESPs on a nondiscriminatory basis.[105] It states that all of its external enhanced services subscribe to AT&T basic services at the same tariffed rates that it charges to others.[106]

34. AT&T attaches tariff pages for several of its basic services.[107] As noted above, it also provides detailed discussions of APS,[108] DDS,[109] 800 service,[110] and ACCUNET T1.5 service.[111] For example, AT&T describes APS as a public switched digital service that transports data in packets using the X.25 protocol, and that is accessed by ESPs via dedicated voice grade or digital access lines which operate at various transmission speeds.[112] It describes DDS as a private line service, designed to operate on a virtually error-free basis with minimal outages, that provides both two-point and multipoint transmission at data transfer rates of 2.4 kilobits per second (kbps), 4.8 kbps, 9.6 kbps and 56 kbps.[113]

b. *Positions of the Parties*

35. Telenet states that AT&T uses APS in providing at least two of its enhanced services -- AT&T Mail and Transaction Services. It contends that one of our CEI requirements is that AT&T enhanced services subscribe to AT&T interoffice transport facilities at tariffed rates, rather than embedded cost.[114] Under this requirement, argues Telenet, AT&T should be required to unbundle its APS offering into two components, digital transport and switching, with the digital transport element of APS priced at the same tariffed rates as AT&T's interoffice DDS circuits.[115] IBM takes the same position as Telenet on this issue.[116] It emphasizes that enhanced service providers rely on AT&T's DDS circuits, not the packaged APS service, to compete with AT&T and that allowing AT&T's enhanced operations to purchase those same circuits at the discounted price reflected in the APS rates amounts to a discriminatory price squeeze.[117]

36. AT&T contests the arguments of IBM and Telenet, arguing that APS is a basic service which need not be unbundled further.[118] It notes that its enhanced service operations take APS at its tariffed rates and that the service is available to anyone else, including competing

enhanced service providers, at the same rates and on the same terms and conditions. It contends that CEI requires no more. In support of its position, it summarizes and endorses the Bureau's *Transaction Service Order*, which, it claims, reached the same conclusion.[119]

c. *Discussion*

37. APS is a basic service that consists of a combination of interoffice transmission channels and packet switching.[120] While Telenet and IBM characterize their arguments as requesting that we require AT&T to "unbundle" APS into two of its component parts -- interoffice channels and packet switching -- the practical effect that they appear to be seeking is to compel AT&T either to (i) raise the rates that it charges for APS, or (ii) lower the rates that it charges for DDS. Telenet and IBM argue that, although the interoffice channels that are a part of APS are equivalent to those that comprise DDS, the tariffed rates for APS improperly reflect an "embedded cost" for these channels that is lower than the tariffed rates for DDS. They contend that AT&T should be required to adjust the tariffed rate for APS to reflect the tariffed rates for DDS. If such an adjustment were made, the effect would be to increase the cost of interoffice channels to APS, unless AT&T lowered the price of DDS.

38. The arguments of Telenet and IBM that APS should be "unbundled" and subject to a "transmission-at-tariff" requirement for its component parts raise issues concerning the proper pricing of APS and the legitimacy of AT&T's relying on APS as a basic service building block for its enhanced offerings. We have addressed these issues in previous orders. First, in the *Transmittal 474 Order*,[121] we considered the tariffed rates AT&T had filed for APS and held that APS was appropriately priced in relation to the prices that AT&T was charging for DDS. IBM contended in the APS tariff proceeding that "the Bureau erred in accepting the APS tariff because Commission precedent requires underlying transmission lines to be priced at tariffed rates."[122] We reached a contrary conclusion, explicitly rejecting IBM's interpretation of Commission precedent, and affirmed the Bureau decision to let the APS tariff go into effect.[123] Second, in the *Phase II Order* we did not, as Telenet and IBM imply, reverse that finding for APS but, in fact, reinforced it by establishing differing requirement for AT&T and the BOCs. The *Phase II Order* established four specific CEI requirements for BOC protocol processing services based on our requirements for the BOCs in the *Asynchronous / X. 25 Order*, including an obligation to apply to their own enhanced service operations the tariffed rates for the interoffice channels related to the provision of packet service.[124] The *Phase II Order* distinguished AT&T from the BOCs, however, and, in the next paragraph, applied to AT&T only a general nondiscrimination requirement concerning the basic services it uses in its enhanced services that include protocol processing. The purpose of that requirement was to require AT&T to provide to its competitors "the digital transmission services that underlie its enhanced services that use protocol processing" on the same terms and conditions that it supplies these services to itself.[125] That APS is such a service was also confirmed by our decision in the *Phase II Order* to continue to treat packet switching services offered by carriers as a basic service even when offered in conjunction with enhanced protocol processing.

39. If we had intended to apply to AT&T the same kind of unbundling requirement that we apply to the BOCs, we would have described its obligations in the same terms that we used in the preceding paragraph of the *Phase II Order* to describe the applicable BOC requirement. We instead described the AT&T requirement in terms that are fully consistent with an AT&T decision to use APS as the underlying basic service for its own protocol processing services.[126]

40. The holding of the *Phase II Order* on this issue is fully consistent with the economic analysis of the *Phase I Reconsideration*, which we adopted on the same day. The *Phase I Reconsideration* found that, while competition in the interexchange markets that AT&T serves is not perfect, it is sufficiently strong to justify less intrusive CEI/ONA safeguards for AT&T than for the BOCs.[127] Neither Telenet nor IBM nor any other party sought reconsideration of this aspect of the *Phase II Order*. After an interval of 18 months, they have raised the issue again in an ONA implementation proceeding, but without describing any changed conditions in the industry that would justify revisiting the question.[128] To the extent that conditions have changed, they have changed in the direction of more competition, both in quantitative and qualitative terms, with other interexchange carriers increasingly capable of providing high quality data transmission channels.[129] Accordingly, we find that AT&T's proposed level of unbundling for APS satisfies the relevant CEI requirements, in general, and for protocol processing, in particular.

41. No commenters have expressed any interest in the further unbundling of any other tariffed services that AT&T describes, and our own evaluation leads us to conclude that this section of AT&T's plan complies with our requirement. We therefore approve it.

2. *Other CEI Requirements*

42. Besides unbundling and resale, we have also adopted CEI requirements pertaining to interface functionality;[130] technical characteristics;[131] installation, maintenance, and repair;[132] end-user access;[133] CEI availability;[134] minimization of transport costs;[135] recipients of CEI;[136] and CEI pricing.[137]

a. *AT & T's Plan*

43. AT&T provides detailed descriptions of its plans to comply with our requirements regarding interface functionality;[138] equality of technical characteristics;[139] nondiscrimination in its provision of installation, maintenance, and repair services;[140] equality of end-user access;[141] operational dates of CEI services;[142] facilities configurations to minimize transmission costs of ESPs;[143] and avoidance of prohibited use and customer restrictions.[144]

b. *Positions of the Parties*

44. No parties comment on these sections of AT&T's plan.

c. *Discussion*

45. After evaluating these sections of AT&T's plan, we conclude that they comply with our requirements, and we approve them.[145]

B. ***Other Nonstructural Safeguards***

1. ***Customer Proprietary Network Information***

46. The *Phase I Order* held that AT&T may use CPNI for its enhanced service marketing operations, provided that it establishes procedures to honor any requests from customers that their CPNI be (i) withheld from carrier-affiliated enhanced service personnel affiliated with AT&T, or (ii) released to other enhanced service providers.[146] The *Phase II Order* required AT&T to notify its multiline business customers of these rights on an annual basis.

47. The *Phase II Reconsideration* stated that we expected carriers to take special care to protect the CPNI of customers, expecially enhanced service providers, that request restricted treatment of their CPNI.[147] We required AT&T and the BOCs to designate "network services only" personnel or take other steps to handle the provision of basic network services to such customers.[148] We also adopted five requirements designed to facilitate users' ability to limit access to their CPNI.[149] First, each CPNI notice to multiline business customers must include a response form that customers may use to inform the carrier of their preferred CPNI treatment. Second, a customer's choice to restrict release of its CPNI shall remain in effect until the customer expressly chooses otherwise. Third, customers may authorize release of some or all of their CPNI for specific time periods or for specific purposes. Fourth, AT&T and the BOCs must honor customer requests for restricted treatment of CPNI that are sent before the carriers send notices of CPNI rights. Fifth, AT&T and the BOCs must include copies of their proposed notification of CPNI rights and response forms with their ONA plans.[150]

a. ***AT & T's Plan***

48. AT&T attached to its plan a copy of the CPNI procedures that it filed on October 26, 1987, as part of its CEI plan for its Transaction Services offering.[151] On March 10, 1988, AT&T amended its ONA plan pursuant to the CPNI clarifications of the *Phase II Reconsideration*, the text of which was released after AT&T filed its plan.[152] The Amendment describes how AT&T will identify CPNI;[153] how it will provide CPNI notifications to its business customers,[154] including copies of notification and response forms;[155] and what actions it will take when a customer requests that its CPNI be restricted from release to AT&T personnel involved in the provision of enhanced services.[156]

49. AT&T states that, when a business customer asks for CPNI restrictions, its AT&T account representative will, if necessary, inquire about the nature of the request.[157] If the request for limited access is in connection with a specific project and is intended to ensure that project-specific CPNI not be used by AT&T to market CPE or enhanced services in competition with other vendors designated by the customer, says AT&T, it will advise the customer that its designated vendors for that project can be served through AT&T's Vendor Liaison Program (VLP).[158] AT&T states that its VLP personnel are distinct and separate from the rest of AT&T's marketing operations.[159] It says that it will train its personnel to comply with these procedures and asserts generally that it has in place procedures to implement these rules.[160] If a residential customer requests restricted treatment of that customer's CPNI, AT&T states that it will ensure that a cautionary message appears on the screen of any work station being used to access restricted information from the relevant database.[161]

b. ***Positions of the Parties***

50. ADCU says that, by proposing only to "honor" customer requests for restricted treatment of their CPNI by prohibiting its network sales personnel from marketing enhanced services to those customers, AT&T fails to comply with our requirement granting subscribers the right to "direct that their CPNI be *withheld* from AT&T . . . enhanced services personnel."[162] ADCU says that AT&T's procedures are manifestly inadequate because, to the extent that AT&T enhanced service personnel look at the CPNI of a competing ESP that uses AT&T's network, the main value of such CPNI lies in its utility in marketing AT&T enhanced services to the customers of the ESP, not the ESP itself.[163]

51. AT&T replies that we have already addressed ADCU's concerns in the *Phase I Order* and concluded that existing safeguards are adequate.[164] It cites language in which we discussed the potential for carriers to analyze the CPNI of end users to determine which of them are users of enhanced services, and in which we concluded that the appropriate remedy was for ESPs either to order such services in their own name, on behalf of their customers, or for ESPs to ask their customers to request that restrictions be placed on carrier use of their CPNI.[165] AT&T also cites the Bureau's *Transaction Services Order* as support for its position.[166]

c. ***Further Pleadings***

52. On July 15, 1988, and August 25, 1988, in response to a request for stay from a group calling themselves the Transaction Service Providers (TSPs), AT&T filed letters proposing to modify its treatment of CPNI.[167] The July 15 Letter states that, for customers requesting general confidentiality of their CPNI, AT&T will separately support their network services by using its Carrier Service Center (CSC). It describes the CSC as a marketing and provisioning organization that has been in existence since divestiture and is entirely separate from AT&T's general marketing structure. The CSC is currently staffed and equipped to provide marketing, provisioning and billing support for competing interexchange carriers' (IXCs') basic service needs. AT&T explains that it established the CSC as a separated, internal organization principally to ensure confidentiality of the IXCs' sensitive network information, because it recognized that AT&T's basic services are in direct competition with these other carriers' services. AT&T emphasizes that the CSC is committed to keeping the IXCs' sensitive network information, *i.e.*, their CPNI, confidential from AT&T's basic services sales force. It says that the CSC can provide similar separate support for network services to many of those customers who request general confidentiality of their CPNI, by maintaining a separation between network and enhanced services marketing.

53. AT&T further states, in the July 15 Letter, that it has conveyed written instructions to all of its marketing personnel that they may not access or use a customer's CPNI for purposes of selling enhanced services to any customer that has requested confidentiality of its CPNI. AT&T also states that it will make explicit in those instructions that restricted CPNI may not be accessed or used for any purpose involving the development, market-

ing, or provision of enhanced services or CPE. It says that these instructions will specifically prohibit the access or use of restricted CPNI to (1) develop services or equipment that compete with the offerings of AT&T's customers, or (2) identify AT&T customers' clients and target AT&T sales efforts at such clients. AT&T says that it will amend its code of conduct to reflect that policy, and it asserts that adherence to that code is a condition of continued employment by AT&T. It also says that it has sent to all of its marketing personnel a letter from the appropriate AT&T senior vice president emphasizing the importance of maintaining the confidentiality of restricted CPNI. Finally, the July 15 letter states that AT&T does not have the ability to preclude physical access to all of the CPNI that might be present in any of the 400 data bases and systems now in use within that company.[168]

54. The August 25 letter commits AT&T to restrict access, through the use of passwords and identification (ID) restrictions, to its Billing Inquiry And Collections system (BAC) and its Customer Record Data Base (CRDB) when customers request general confidentiality of their CPNI.[169] It characterizes those data bases as the ones most frequently accessed by AT&T sales personnel. AT&T states that those data bases contain current customer service and billing records for its WATS/800; LDS; Megacom/Megacom 800; READYLINE; and private line services. Although many other data systems contain some CPNI, it says, the data in other data bases tends to be highly fragmented, and the systems are either not generally accessible to AT&T sales personnel or useful from a CPNI standpoint.[170] Once AT&T has implemented its access denial procedures, it adds, personnel who have ID/password access to either BAC or CRDB will receive an error message when they call up a restricted account; the account information will not be displayed; and the user will be notified that the account has been transferred to the CSC or bifurcated in a way that prevents enhanced service personnel from accessing the customer's CPNI.[171]

d. ***Discussion***

55. We construe the July 15 and August 25 Letters as applying to all AT&T enhanced services, and we condition our approval of AT&T's plan on AT&T's conformance with that interpretation. AT&T essentially proposes three measures to restrict customers' CPNI from access by its enhanced service personnel: administrative and disciplinary measures; use of the CSC and VLP; and the use of password/IDs in important CPNI databases. Taken as a whole, these measures are adequate. Our CPNI requirements, of course, apply to all of the CPNI in AT&T's possession, and AT&T is under an obligation to ensure that its personnel do not use any of that information improperly. In addition to the other protective measures that AT&T proposes, by indicating its intent to establish password protection for restricted CPNI in the databases that are most frequently used by its sales personnel, as well as the other measures it describes, AT&T has demonstrated a good-faith effort to comply with our rules.[172] We recognize that it might not be cost-effective to apply password protection to every AT&T database that might contain some restricted CPNI, and that other less costly measures could achieve the desired results for databases that are generally not accessed by sales personnel and that contain CPNI in fragmented forms that are not very useful for marketing enhanced services. Accordingly, on the basis of all of these considerations, we approve this section of AT&T's plan, as amended by the July 15 and August 25 Letters.[173]

2. ***Nondiscrimination Reports***

56. The *Phase II Order* required AT&T and the BOCs to file quarterly nondiscrimination reports that provide comparative data on the timing of installation and maintenance, as well as the quality and reliability, of the basic services offered as part of any CEI tariff.[174] The *Phase II Reconsideration* eliminated the requirement that AT&T submit reports on the quality of the basic services that it provides as part of its CEI/ONA tariffs, provided that it (1) amends its plan to include a detailed description of its installation procedures that demonstrates its inability to engage in quality-based discrimination, and (2) submits an annual affidavit attesting that it has followed the installation procedures described in its plan amendments and that it has not, in fact, discriminated in the quality of network services used by competing enhanced service providers.[175] We denied AT&T's request for permission to file installation and maintenance data only for its own enhanced service operations, but we modified our requirements to permit AT&T to file reports comparing installation and maintenance intervals provided to its own enhanced service operations with those provided to a sampling of all customers.[176]

a. ***AT & T's Plan***

57. The Nondiscrimination Amendment states that AT&T follows highly mechanized circuit and central office equipment assignment procedures, done on a first-come, first-served basis with no qualitative comparisons possible between particular available trunks or pieces of equipment.[177] Moreover, AT&T states that it does not gather or have information regarding which of its customers are providing enhanced services, because such information is irrelevant to the process of providing and maintaining basic services.[178] It describes in detail the sequence of actions that AT&T personnel take in response to customer requests for private line circuits.[179] AT&T claims that the databases that its personnel use to assign equipment and service contain no information on qualitative performance, other than whether minimum standards are met.[180] In addition, AT&T says that it trains its employees to follow our nondiscrimination requirements and warns them that they will be subject to disciplinary action if they violate those policies.[181]

b. ***Positions of the Parties***

58. UCC/OC urges us to reinstate our quality reporting requirements and maintain them for an indefinite period, and only consider their elimination after AT&T and the BOCs establish a clear record of nondiscriminatory conduct.[182] UCC/OC also recommends that we require those carriers, including AT&T, to file special nondiscrimination reports to ensure that those carriers do not discriminate against ESPs that OCC/OC describes as "electronic publishers." UCC/OC contends that the first amendment rights of "electronic publishers" deserve an extra level of protection.[183]

59. The AT&T reply comments characterize UCC/OC's requests as nothing more than an untimely petition for reconsideration of our prior findings in the *Phase II Order* and the *Phase II Reconsideration*.[184] AT&T argues that

UCC/OC does not even address, much less disprove, the evidence that AT&T has submitted to demonstrate that it is unable to engage in quality-based discrimination.[185]

c. *Discussion*

60. We reject the UCC/OC suggestion that we require AT&T to file special reports to ensure that it does not discriminate against a special class of ESPs known as "electronic publishers." Through both the *Computer II* and the *Computer III* proceedings, we have seen no need to distinguish, for regulatory purposes, among different categories of enhanced service providers. Our nonstructural safeguards are designed to prevent discrimination by AT&T and the BOCs against all ESPs. UCC/OC's arguments for special protections for "electronic publishers" are an untimely petition for reconsideration of our rules, and in any event do not convince us that we should establish a special category for these entities. We find it difficult to identify "electronic publishers" as a distinct class separate from, for example, ESPs that provide access to databases, bulletin boards, or even value-added networks (VANs). Our nonstructural safeguards, including our nondiscrimination requirements as modified in the *Phase II Reconsideration*, are adequate to meet our regulatory goals. Even if it were feasible for us to define, and AT&T to identify, which ESPs are "electronic publishers," AT&T would then have to program this information into its databases. Not only would this process be difficult and costly, but it might have the perverse effect of making it easier for AT&T personnel to discriminate, by allowing them to identify the basic services used by these competitors.

61. We also reject UCC/OC's suggestion that we reinstate our quality reporting requirements. AT&T contends that it does not presently record the performance level of its circuits, except to note whether they conform to minimum quality levels. Reinstating our quality reporting requirements would impose a costly burden on AT&T, forcing it to gather and record information that it does not presently possess. The existence of that information could also have the perverse effect of actually facilitating discrimination against AT&T's competitors.

62. Based upon our examination of AT&T's Nondiscrimination Amendment, we conclude that all ESPs, including electronic publishers, are more likely to receive adequate service, equivalent to that provided to AT&T's enhanced service operations, if AT&T continues to exclude from its databases information on the categories of customers and the quality of its circuits. We find AT&T installation procedures are sufficiently nondiscriminatory to justify removal of the quality reporting requirement. Accordingly, we approve this section of AT&T's plan.

3. *Allocation of Joint and Common Costs*

63. The *Phase I Order* required AT&T and the BOCs to comply with the requirements of the *Joint Cost Order*, as a precondition to the removal of structural separation requirements.[186]

a. *AT & T's Plan*

64. AT&T states that it will continue to account for the costs of providing its external services pursuant to the provisions of the Cost Allocation Manual that it filed on November 12, 1987, pursuant to the *Joint Cost Order*.[187] It states that, although its manual has not yet received final approval from us, it currently has interim authority to account for the costs of its non-collocated, non-integrated enhanced services under the provisions of that manual.[188]

b. *Positions of the Parties*

65. No parties comment on this section of AT&T's plan.

c. *Discussion*

66. On March 18, 1988, after AT&T filed its plan, the Bureau conditionally approved AT&T's cost allocation manual.[189] The Bureau required AT&T to specify in greater detail the accounting procedures that it intends to follow in certain instances, but it concluded that, overall, AT&T's manual provides sufficient assurance against the misallocation of costs and revenues to permit its permanent implementation.[190] Since AT&T has stated that it will conform with the provisions of that manual, we approve this section of its plan.

4. *Disclosure of Network Information*

67. The *Phase I Order* announced a general policy requiring AT&T and the BOCs to disclose information about network changes or new network services that affect the interconnection of new network services with the network.[191] The *Phase II Order* described the network disclosure requirement in greater detail.[192]

a. *A T & T's Plan*

68. AT&T states that it discloses to the public, prior to implementing a new service and in accordance with our rules, all information relating to network design and technical standards affecting the manner in which CPE and enhanced services are connected to AT&T's network.[193] It specifically states that it will comply with the disclosure requirements of in the *Phase I Order and the Phase II Order*.[194]

b. *Positions of the Parties*

69. No parties comment on this section of AT&T's plan.

c. *Discussion*

70. Since AT&T has stated its intention to comply with our network disclosure rules, we approve this section of AT&T's plan.

C. *Conclusion*

71. Subject to the conditions stated above, the nonstructural safeguards described in AT&T's plan for AT&T's noncollocated services adequately replace those of the *AT&T Limited Waiver Order*. We direct AT&T to implement such safeguards as soon as possible. So long as AT&T applies such safeguards, it need not file a CEI plan for any noncollocated enhanced service.

VIII. CLASSIFICATION OF SPECIFIC AT&T SERVICES AS ENHANCED OR BASIC

A. Redi-Access

1. *Positions of the Parties*

72. Telenet claims that a service called REDI-ACCESS, which it says AT&T co-markets with the Control Data Corp. (CDC), is an enhanced service offering of AT&T that AT&T has failed to identify as such. [195] According to an AT&T advertisement, which Telenet quotes and attaches to its comments, REDI-ACCESS is a service that "offer[s] the quality, reliability and speed of AT&T ACCUNET Packet Service through asynchronous dial-up access." [196] AT&T rejects Telenet's characterization of REDI-ACCESS as an AT&T service, and asserts that it is a service of CDC that is merely co-marketed with AT&T's APS. [197]

2. *Discussion*

73. REDI-ACCESS appears to be a service that includes protocol conversion, which would make it an enhanced service for purposes of our regulations. AT&T does not contest the enhanced nature of the service, but denies that REDI-ACCESS is *its* enhanced service. It claims that it simply co-markets the service with CDC and that this is not a sufficient nexus with the service to invoke our CEI requirements.

74. Our *Computer III* rules apply when AT&T offers an enhanced service on a structurally unseparated basis. While we have devoted substantial effort, in both the *Computer II* and the *Computer III* proceedings, to clarifying our definition of "enhanced services," [198] we have not previously discussed AT&T or BOC conduct that constitutes an "offer" of such service. The term should be read in the overall context of our *Computer III* rules. Those rules were designed to ensure that AT&T and the BOCs do not use their positions as providers of critical basic services to discriminate unreasonably in favor of, or against, particular enhanced service offerings. We intend these rules to apply when a carrier has an interest, legal or beneficial, in the success of an enhanced offering sufficient to create incentives for it to engage in such discrimination. For example, AT&T clearly has such incentives regarding enhanced services whose profits or losses it books in its unregulated accounts. AT&T would have similar incentives if it had the right, pursuant to a contractual agreement, to share in the profits of an enhanced service. AT&T might also be motivated to discriminate by factors other than a direct profit position in an enhanced service. A commercial relationship between AT&T and an ESP that involves the offering of an enhanced service to the public, other than a carrier-customer relationship for basic services, could indicate the existence of such incentives. Presumably, AT&T would not enter into such a commercial relationship unless it would benefit in some fashion from the success of the enhanced offering.

75. Thus, AT&T or a BOC "offers" an enhanced service, for purposes of our ONA requirements, if it has an interest in the enhanced offering sufficient to create incentives for it to discriminate in its basic service offerings in favor of the offeror or against its competitors. We condition our approval of the Plan on AT&T's compliance with our CEI/ONA requirements with regard to all such enhanced services. Compliance with our CEI requirements should not be onerous for noncollocated enhanced services offered by a third party whose use of

AT&T's basic network services resembles that of customers not affiliated with AT&T. The present record does not clearly indicate whether AT&T's interest in REDI-ACCESS is such that AT&T would have incentives to discriminate. However, in light of the fact there is clearly a commercial relationship other than a mere carrier-customer relationship between AT&T and CDC regarding REDI-ACCESS, and the generally non-onerous nature of our CEI requirements in these circumstances, we require AT&T either (i) to comply with our CEI requirements for noncollocated enhanced services, or (ii) file a statement with the Bureau within 60 days of the release of this order explaining why AT&T should not be required to comply with those requirements. [199]

B. ***Call Prompter***

1. ***Positions of the Parties***

76. DYTEL argues that AT&T is offering an enhanced version of its Call Prompter [200] service that is not being charged all of the basic network usage fees that AT&T imposes on comparable unaffiliated ESPs that use the same kind of service. [201] AT&T says that the only Call Prompter service that it offers is a basic service, suggesting that DYTEL has confused Call Prompter with AT&T's Speech Response Service. [202] By contrast, claims AT&T, Call Prompter is an optional feature of AT&T's tariffed 800 service that provides purely a network routing function by directing calls to different customer destinations, on the basis of Touchtone signals that the customer generates in response to voiced prompts. [203] Moreover, it contends, assuming that DYTEL is concerned about Call Prompter, DYTEL's claim of competitive disadvantage is predicated on the erroneous assumption that AT&T's 800 Call Prompter customers are given "free" 800 service for non-productive time incurred until the call is answered by a live party, whereas, in fact, AT&T charges the customer between 6.5 and 10 cents for each Call Prompter announcement (depending on volume), whether the call is answered or not. [204]

2. ***Discussion***

77. We have already addressed the appropriate classification and configuration of AT&T's Call Prompter offering in our *Advanced 800 Service Order*. [205] That order rejected AT&T's initial version of Call Prompter on the ground that it could encompass the provision of an enhanced service and a tariffed offering of such a service would violate our rules. [206] We directed AT&T to reconfigure the service and refile its tariff. AT&T did refile its tariff in compliance with the requirements of the *Advanced 800 Service Order*.[207] Since Call Prompter, as presently configured, is not an enhanced service, the terms under which AT&T provides that service do not violate any of our *Computer III* rules.. [208]

IX. ORDERING CLAUSES

78. IT IS HEREBY ORDERED, that pursuant to Sections 1, 2(a), 4(i) and (j), 201, 202, 203, 205, 218, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i) and (j), 201, 202, 203, 205, 218, and 405, and 5 U.S.C. § 553, AT&T's ONA plan IS APPROVED, subject to the conditions described herein.

79. IT IS FURTHER ORDERED, that DYTEL's motion for leave to file late comments IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

PARTY FILING ONA PLAN
American Telephone & Telegraph Co. (AT&T)

PARTY FILING AMENDMENT TO ONA PLAN
AT&T

PARTIES FILING COMMENTS

Association of Data Communications Users, California Bankers Clearing House Assn., Committee of Corporate Telecommunications Users, Mastercard International, Inc., New York Clearing House Assn., and VISA U.S.A., Inc. (ADCU)

DYTEL Corp. (DYTEL)

International Business Machines Corp. (IBM)

NCR Corp. (NCR)

Telenet Communications Corp. (Telenet)

United Church of Christ Office of Communication (UCC/OC)

PARTY FILING REPLY
AT&T

FOOTNOTES

[1] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *further reconsideration pending, appeals pending sub nom. California v. FCC*, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1987) and *sub nom. Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (*1988*)(*Phase II Reconsideration*), *further reconsideration pending, (pet. for rev. filed Apr. 20, 1988), California v. FCC*, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988) and *Illinois Bell Telephone Co. v.* FCC, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988).

[2] Parties filing comments replies are listed in Appendix A. We use the abbreviations that appear in that Appendix throughout this order.

[3] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Notice of Proposed Rulemaking*, FCC 85-397 (released Aug. 16, 1985).

[4] Second Computer Inquiry, *Final Decision*, 77 FCC 2d 384 (Final Decision), *modified on reconsideration*, 84 FCC 2d 50 *(1980) (Reconsideration Order), further modified on reconsideration*, 88 FCC 2d 512 (1981) *(Further Reconsideration Order), aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982)(CCIA v. FCC), *cert. denied, 461 U.S. 938 (1983), aff'd on second further reconsideration*, FCC 84-190 (released May 4, 1984).

[5] *See Phase I Order*, 104 FCC 2d at 968, para. 10.

[6] *Id.* at 1011-1092, paras. 98-99, 127-131, 147-166, 171-186, 190-193, 198-200, 210-222, 234-240, 246-255, 260-265.

[7] Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities, *Report and Order*, 2 FCC Rcd 1298 (1987), *aff'd on reconsideration*, 2 FCC Rcd 6283 (1987).

[8] *Phase I Order*, 104 FCC 2d at 1026-1092, paras. 127-131, 147-166, 171-186, 190-193, 198-200, 210-222, 234-240, 246-255, and 260-265.

[9] *Phase I Reconsideration*, 2 FCC Rcd at 3042, para. 45.

[10] *Id.*

[11] *Id.* at 3039-3040, para. 32.

[12] *Id.* at 3043, para. 52.

[13] *Id.* at 3043, para. 53, *citing* Petition of AT&T for Limited and Temporary Waiver of 47 CFR Section 64.702 Regarding Its Provision of Unregulated Services Externally to the AT&T-C Network, *Memorandum Opinion and Order*, Mimeo No. 1147 (released Nov. 27, 1985), appl. for *rev. denied*, 104 FCC 2d at 1043, n. 220 (*AT & T Limited Waiver Order*).

[14] *Phase I Reconsideration*, 2 FCC Rcd at 3040-3041, para. 32.

[15] 3 FCC Rcd at 1137-1138, paras. 21-23.

[16] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Phase II, *Report and Order*, 2 FCC Rcd 3072, *modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration*).

[17] *Phase II Order*, 2 FCC Rcd at 3078, para. 43, *aff'd on reconsideration*, 3 FCC Rcd at 1153-1154, paras. 21-27.

[18] *Phase II Order*, 2 FCC Rcd at 3080-3081, paras. 61-63, *aff'd on reconsideration*, 3 FCC Rcd at 1157, para. 51.

[19] *Phase II Order*, 2 FCC Rcd at 3086, para. 100, *modified on reconsideration*, 3 FCC Rcd at 1159-1160, paras. 66-71, 76-77, 80-82, and 84.

[20] *Phase II Order*, 2 FCC Rcd at 3086-3087, paras. 107-112.

[21] *Id.* at 3095, paras. 154-155 and 3097, para. 174, *modified on reconsideration*, 3 FCC Rcd at 1162-1164, paras. 96-99 and 104-109.

[22] *Phase I Reconsideration*, 2 FCC Rcd at 3043, para. 51.

[23] *Id.*

[24] AT&T Plan at 4.

[25] *Id.*, Appendices A-F.

[26] *Id.* at 7-8.

[27] *Id.* at 8-9.

[28] *Id.* at 10. APS is a packet-switched data transmission service that does not include protocol processing and is classified as a basic service.

[29] *Id.* at 10-12.

[30] *Id.* at 13. AT&T states that, under ISDN standards, a single interface is divided into a discrete number of channels in multiples of 64 kilobits per second (kbps), except for a 16 kbps signaling channel. It notes that there are two types of ISDN channels -- B channels, used for transmission of customer information, and D channels, used for sending signals and control information across the interface. AT&T indicates that the ISDN basic rate interface will consist of two 64 kbps B channels and one 16 kbps D channel, while the so-called primary rate interface will consist of 23 B channels and one D channel. *Id.* at 14 n. *.

[31] *Id.* at 15. AT&T says that this feature will enable customers to allocate their access channels among AT&T's switched nodal services on a per-call basis. *Id.*

[32] *Id.* at 16.

[33] *Id.*

[34] CCS7 is a technology compatible with ISDN that for conveyes call set-up and related information through data channels that are separate from the channels that customarily carry voice signals or comparable information content. *See, e.g.*, Pactel ONA Plan, CC Docket 88-2, Phase I (filed Feb. 1, 1988) at 53-54.

[35] AT&T Plan at 17.

[36] *Id.*

[37] *Id.* at 17-18 and 18 n. **.

[38] *Id.* at 19-21.

[39] IBM Comments at 14 n. 25.

[40] NCR Comments at 3.

[41] AT&T Reply at 4, n. **, *citing Transaction Services Order*, 3 FCC Rcd 2702 at 2705, para. 25 (1988), *request for stay pending application for review pending*.

[42] We disagree with AT&T, however, that this issue is precisely analogous to that involved in the Bureau's *Transaction Services Order*. That order addressed, *inter alia*, the rates that AT&T should charge itself for the use of interoffice trunks in providing a basic, packet-switched service, APS. It did not squarely address the extent of any obligation that AT&T might have to unbundle those interoffice trunks and offer them separately under tariff. Indeed, AT&T's existing DDS is an unbundled, separately tariffed version of the interoffice trunks used by APS. Here IBM and NCR urge that AT&T be required to unbundle a service, signaling and diagnostic information, that AT&T has not separately tariffed at any price.

[43] *Phase I Reconsideration*, 2 FCC Rcd at 3039-3040, para. 32.

[44] *Id.*

[45] *Id.* at 3040, paras. 48-49.

[46] *Id.* at 3043, paras. 51-52.

[47] *Id.* at 3043, para. 52.

[48] AT&T Plan at 22.

[49] *Id.* at 23-27.

[50] *Id.* at 24.

[51] "LATA" is the acronym for local access transport area. In territories served by the BOCs, a LATA is equivalent to an "exchange area," as defined in the Modification of Final Judgment, the consent decree that provided for the AT&T divestiture. *See United States v. AT & T*, 552 F.Supp. 131 at 229 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). Pursuant to that decree, the BOCs are permitted to provide services within LATAs, but not between LATAs.

[52] AT&T Plan at 25.

[53] *Id.* at 26, *citing* Bell Communications Research, *ONA Special Report Number 1, Issue 2* (October 1987).

[54] AT&T Plan at 26.

[55] *Id.* at 26-27.

[56] *Id.* at 27-28.

[57] *Id.* at 29.

[58] *Id.* at 29-30.

[59] *Id.* at 31-33.

[60] *Id.* at 33-34.

[61] *Id.* at 34-35.

[62] *Id.* at 35-36.

[63] *Id.* at 37.

[64] *Id.*

[65] *Id.* at 37 and 32-33.

[66] *Id.* at 37.

[67] *Id.* at 38.

[68] Telenet Comments at 4.

[69] *Id., citing* AT&T Plan at 38.

[70] Telenet Comments at 4.

[71] *Id., citing Phase I Reconsideration,* 2 FCC Rcd at 3043, para. 52.

[72] Telenet Comments at 4.

[73] AT&T Reply at 9.

[74] *Id.*

[75] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, *Phase I, Memorandum Opinion and Order,* FCC 88-381 (released , 1988).

[76] Since AT&T will be completing its deployment of CCS7 capabilities before the BOCs do so, it appears that the constraining factors affecting scheduling in this process involve the BOCs to a large extent.

[77] *Phase I Reconsideration,* 2 FCC Rcd at 3043, para.52.

[78] *Id.*

[79] 2 FCC Rcd at 3050-3051, paras. 106-112.

[80] *Id.* at 3051, para. 111.

[81] AT&T Plan at 4-5.

[82] *Id.,* Appendices A-F.

[83] *Id.* at 13.

[84] 2 FCC Rcd at 3043, para. 52.

[85] AT&T Plan at 39.

[86] *Id.*

[87] *Id.* at 40.

[88] *Id.* at 40-42.

[89] *Phase I Reconsideration,* 2 FCC Rcd at 3043, para. 53, *citing AT&T Limited Waiver Order;* and Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Co., *Order,* 102 FCC 2d 655 (1985) *(AT&T Structural Relief Order), recon.* FCC 86-341 (released Aug. 7, 1986).

[90] *Phase I Reconsideration,* 2 FCC Rcd at 3043, para. 53.

[91] *Id.*

[92] If AT&T wishes to collocate these or other enhanced services with its basic service facilities, it must file a CEI plan for such enhanced services. AT&T has proposed such collocation for one of the enhanced services it has been offering pursuant to the *AT&T Limited Waiver Order* -- Transaction Services. It filed a CEI plan for that service, which was approved by the Bureau and is now before us on applications for review. *See Transaction Services Order.*

[93] AT&T Plan at 43 n. * * *.

[94] *Id.* at 43.

[95] *Phase I Reconsideration,* 2 FCC Rcd at 3048, para. 92.

[96] *Id.* at 3048, para. 92.

[97] *Phase II Order,* 2 FCC Rcd at 3078, para. 43.

[98] *Id.* at 3080, para. 61.

[99] *Id.* at 3081, para. 63.

[100] *Id.*

[101] *Id.* at 3080-3081, para. 62.

[102] Petition for Waiver of Section 64.702 of the Commission's Rules, *Memorandum Opinion and Order,* 100 FCC 2d 1057 (1985).

[103] *Phase II Order* at 3080-3081, para. 62.

[104] AT&T plan at 45.

[105] *Id.*

[106] *Id.* at 46.

[107] The services for which AT&T attaches tariff pages include APS, ACCUNET T1.5, ACCUNET T45, DDS, Voice Grade, Group/Supergroup, Telegraph Grade, Terrestrial Audio, Terrestrial Television, International ACCUNET Digital, and a category that it labels "Miscellaneous Functions and Arrangements." *Id.,* Appendix A.

[108] *Id.* at 10. APS is a packet-switched data transmission service that does not include protocol processing and is classified as a basic service.

[109] *Id.* at 10-12.

[110] *Id.* at 7-8.

[111] *Id.* at 8-9.

[112] *Id.* at 10. AT&T implies, but does not explicitly state, that customers' computers must communicate directly with APS in the same protocol that APS itself uses.

[113] *Id.* at 10-11.

[114] Telenet Comments at 5-7, *citing Phase II Order,* 2 FCC Rcd at 3080-3081, paras. 62-63.

[115] Telenet Comments at 9-10.

[116] IBM Comments at 7-8.

[117] *Id.*

[118] AT&T Reply at 2-4.

[119] *Id., citing Transaction Services Order, supra* note 41.

[120] AT&T Reply at 2-4.

[121] *Transmittal 474 Order,* 2 FCC Rcd 588 (1987), *reconsideration denied,* 2 FCC Rcd 5231 (1987). *See also* AT&T Communications, Inc., Revisions to Tariff F.C.C. Nos. 260, 266, 268, 270, 273 and 274 (Accunet Packet Service), 101 FCC 2d 144 *(1985) (Investigation Order).*

[122] *Transmittal 474 Order,* 2 FCC Rcd at 589, para. 13.

[123] *Id.* at 590, para. 18.

[124] *Phase II Order* 2 FCC Rcd at 3080, para. 62.

[125] *Id.* at 3080-3081, paras. 62-63.

[126] The *Phase II Reconsideration* did not modify or expand the AT&T requirements for its services that include protocol processing.

[127] *Phase I Reconsideration,* 2 FCC Rcd at 3042, para. 46.

[128] Section 1.429 of our rules, 47 C.F.R. § 1.429(d), requires that petitions for reconsideration be filed within 30 days from the date of public notice of a Rule Making decision. Neither IBM nor Telenet raised this issue in a timely petition for reconsideration of the *Phase II Order.* We could construe both of those parties' comments on that issue in this proceeding as untimely-filed petitions for reconsideration, and deny them on procedural grounds. We recognize, however, that, although not relied on by Telenet and IBM in their pleadings, some language in the *Phase II Order* could conceivably be interpreted as suggesting that we sought a revision in the relationship between AT&T's rates for APS and DDS, at least when AT&T uses APS as part of an enhanced service. In declining to amend our rules to treat protocol processing as a basic service, we identified a number of "serious anticompetitive effects" that could follow from such an approach, including that "AT&T and the BOCs might seek to obtain interoffice circuits for the implementation of protocol processing/packet switching networks at 'wholesale'

costs [while] . . . the VANs would be disadvantaged by having to pay higher, tariffed rates for such circuits." *Phase II Order*, 2 FCC Rcd at 3079, para. 49. To the extent this language can be read as suggesting that we intended to require of AT&T the special "unbundling" of underlying transmission channels from packet switching that we required of the BOCs, it is inconsistent with the later discussion in the *Phase II Order* of the specific CEI requirements for protocol processing services, in which we did not impose such a requirement on AT&T. *See id.* at 3081, para. 63. We now clarify that our intentions with respect to AT&T's CEI obligations for its protocol processing services are as stated in that later, specific discussion. This approach is consistent with our conclusion that, for ONA purposes, AT&T should not be required to unbundle its basic services in the same fashion as the BOCs. Thus, to fulfill its CEI obligations, AT&T need only provide others the basic services underlying its enhanced services. APS is such a basic service, and AT&T's proposed use of APS in providing enhanced services satisfies our requirements.

[129] For Telenet, an obvious potential source of alternatives to AT&T's DDS service is US Sprint, Telenet's parent company. For IBM, an obvious source of such transmission links is MCI, a company in which IBM has a major financial stake. Both Sprint and MCI offer a wide range of digital data services, as reflected in those carriers' tariff filings and product announcements, as well as in information reported in the trade press. *See* MCI Tariff F.C.C. No. 1 at 17, 18.1.7, and 34.4-34.4.1 (showing rates and availability of MCI DDS service among 98 cities at 2.4, 4.8, 9.6 and 56 kilobits-per-second (kbps)); US Sprint Tariff F.C.C. No. 5 at 59-60 (1.544 megabits-per-second (mbps) digital data transmission service among 161 cities); US Sprint Product Announcement: "Clearline Digital Fiber Private Line Service" (announcing planned availability of 56 kbps DDS private line service in the third or fourth quarter of 1988); "US Sprint to Broaden Digital Data Offerings: Firm Will Unveil Family of Dedicated Services," *Network Services*, January 11, 1988, at 1 (describing Sprint's plans to offer DDS services ranging in speed from 2.4 kbps to 64 kbps).

[130] *Phase I Order*, 104 FCC 2d at 1039, para. 157.

[131] *Id.* at 1041, para. 160.

[132] *Id.* at 1041, para. 161.

[133] *Id.* at 1041, para. 162.

[134] *Id.* at 1041, para. 163.

[135] *Id.* at 1042, paras. 163-164, *affirmed on reconsideration*, 2 FCC Rcd at 3068, n. 261. *See also Phase II Reconsideration*, 3 FCC Rcd at 1155, para. 34.

[136] *Phase I Order*, 104 FCC 2d at 1042, para. 165, *modified on reconsideration*, 2 FCC Rcd at 3051, para. 111, *affirmed on further reconsideration*, 3 FCC Rcd at 1143-1145, paras. 63-67. *See also Phase I Reconsideration*, 2 FCC Rcd at 3054, para. 134.

[137] *Phase I Order*, 104 FCC 2d at 1047-1049, paras. 172-175, *affirmed on reconsideration*, 2 FCC Rcd at 3068, n. 261, *affirmed on further reconsideration*, 3 FCC Rcd at 1140-1141, paras. 43-46.

[138] AT&T Plan at 44.

[139] *Id.* at 46-47.

[140] *Id.* at 47-49.

[141] *Id.* at 49.

[142] *Id.* at 49-50.

[143] *Id.* at 50-52.

[144] *Id.* at 52.

[145] AT&T does not directly address our CEI pricing requirements, but the tariff pages that AT&T attaches to its plan demonstrate that it complies with those provisions.

[146] 104 FCC 2d at 1089-1090, paras. 260-261.

[147] 3 FCC Rcd at 1163, para. 99.

[148] *Id.* We required AT&T and the BOCs to amend their ONA plans to describe the types of information they will treat as CPNI. *Id.*

[149] *Id.*, 3 FCC Rcd at 1163-1164, paras. 104-109.

[150] We denied requests that we require AT&T to make nonproprietary, aggregate CPNI available to unaffiliated enhanced service providers. *Id.* at 1152, para. 7. However, we retained that requirement for the BOCs. *Id.*

[151] AT&T Plan, Appendix J.

[152] AT&T Plan Amendment. The amendment contains two separate documents, one pertaining to the provisioning of circuits in a non-discriminatory manner, and the other pertaining to CPNI. Hereinafter we refer to those documents, respectively, as the Nondiscrimination Amendment and the CPNI Amendment.

[153] CPNI Amendment at 2-4.

[154] *Id.* at 4-6

[155] *Id.*, Attachments A and B.

[156] *Id.* at 6-9.

[157] *Id.* at 6.

[158] *Id.* at 6-7.

[159] *Id.* at 7.

[160] *Id.* at 9.

[161] *Id.* at 9-10.

[162] ADCU Comments at 58, *citing Phase II Order*, 2 FCC Rcd at 3095, para. 154 (emphasis in original).

[163] ADCV Comments at 58-59.

[164] AT&T Reply at 7-8 and n. *, *citing Phase I Order*, 104 FCC 2d at 1089-1090, para. 261.

[165] AT&T Reply at 8 n. *.

[166] *Id.* at 7-8, *citing Transaction Services Order*, 3 FCC Rcd at 2711, para. 80.

[167] Letter from Francine J. Berry, Vice President and Assistant General Counsel, AT&T, to H. Walker Feaster, Acting Secretary, FCC, July 15, 1988 (July 15 Letter); and Letter from E.C. Fletcher, Division Manager, Federal Regulation Department, AT&T, to H. Walker Feaster, Acting Secretary, FCC, August 25, 1988 (August 25 Letter).

[168] July 15 Letter at 4-5.

[169] August 25 Letter at 1.

[170] *Id.*

[171] *Id.* at 1-2.

[172] AT&T's actions in this regard are consistent with the CPNI protections we found to be necessary for the BOCs in the *BOC ONA Order*, at paras. 426-430. The Commission required each of the BOCs other than NYNEX to implement a password/ID system comparable to that proposed by NYNEX. *Id.* at para. 430. NYNEX will apply a password/ID system to two of its databases. NYNEX ONA Plan, Appendix L at 1-3.

[173] We condition our approval on the understanding that AT&T will honor requests for partial or temporary restrictions on CPNI. *See id.* at para. 444. A request for partial restrictions on CPNI could include, *inter alia*, a customer request that AT&T apply some but not all of the safeguards proposed in the plan to its CPNI.

[174] 2 FCC Rcd at 3086, para. 100.

[175] *Phase II Reconsideration*, 3 FCC Rcd at 1159-1160, paras. 66-71.

[176] *Id.*, 3 FCC Rcd at 1161, paras. 80-82.

[177] Nondiscrimination Amendment at 2.

[178] *Id.* at 2 n. **.

[179] *Id.* at 3-15.

[180] *Id.* at 16.

[181] *Id.* at 17.

[182] UCC/OC Comments at 14-15.

[183] *Id.* at 16-19. UCC/OC does not specify how we can distinguish "electronic publishers" from other ESPs.

[184] AT&T Reply at 8, *citing Phase II Order*, 2 FCC Rcd at 3085-3086, paras. 98-101; and *Phase II Reconsideration*, 3 FCC Rcd at 1159, paras. 66-71.

[185] *Id.*

[186] *Phase I Order*, 104 FCC 2d at 1075, para. 235. *See* note 7, *supra*.

[187] AT&T Plan at 53.

[188] *Id., citing* Cost Allocation Manual for the Accounting Separation of the Regulated and Nonregulated Costs of AT&T Communications, *Memorandum Opinion and Order*, 3 FCC Rcd 143 (1988).

[189] AT&T Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, *Memorandum Opinion and Order*, 3 FCC Rcd 1786 (1988).

[190] *Id.*

[191] *Phase I Order*, 104 FCC 2d at 1082-1086, paras. 250-255.

[192] 2 FCC Rcd at 3087-3088, paras. 107-112, and 3091-3092, paras. 134-140, *modified on reconsideration*, 3 FCC Rcd at 3087-3088, paras. 107-112, and 3091-3093, paras. 134-140.

[193] AT&T Plan at 5.

[194] *Id.* at 56, *citing Phase I Order*, 104 FCC 2d at 1082-1085, paras. 250-254, and *Phase II Order*, 2 FCC Rcd at 3087, paras. 107-112.

[195] Telenet Comments at 6.

[196] *Id.* at 6 and Appendix A. The advertisement implies that REDI-ACCESS augments APS with asynchronous-to-X.25 protocol conversion. The asynchronous protocol is commonly used by personal computers equipped with modems, while the synchronous, X.25 protocol is often used by larger computers for higher speed communication. *See* Petition for Waiver of Section 64.702 of the Commission's Rules, *Memorandum Opinion and Order*, 100 FCC 2d 1057 (1985) *(Asynchronous/X.25 Waiver Order)*. APS accepts data only in the X.25 protocol and, therefore, a protocol conversion is necessary for asynchronous terminals to access APS.

[197] AT&T Reply at 9 n. *.

[198] *See, e.g., Phase II Order*, 2 FCC Rcd at 3078-3082, paras. 43-71; and *Computer II Final Decision*, 77 FCC 2d at 420, para. 96.

[199] If AT&T chooses to comply with our CEI requirements for REDI-ACCESS, it need not file any such statement with this Commission. *See supra* para. 28.

[200] DYTEL describes Call Prompter as a service through which a calling party effectively self-directs his or her call with the aid of voice prompts to a specific station, department, or other called party location. It claims that AT&T offers this capability both as "a separate equipment/enhanced service offering" and as an integral feature of its network-based Advanced 800 Service. DYTEL Comments at 1.

[201] *Id.* at 5-10. DYTEL attaches to its comments a motion for leave to file out of time, which we grant.

[202] AT&T Reply at 5-6. According to AT&T, Speech Response Service permits callers to interact with stored information, such as freight shipping orders, by pressing Touchtone buttons to obtain voice-generated data. *Id.* at 6 n. *. Speech Response Service, it says, uses AT&T 800 Service as its underlying basic service under the same tariffed rates, terms, and conditions that are available to any other user. *Id.* at 6. Because Speech Response Service is provided through facilities external to its network, says AT&T, it begins charging that service for usage as soon as a customer's call is answered, *i.e.*, before the customer begins interacting with any stored information. *Id.*

[203] *Id.* at 4-5, *citing* AT&T Revision to Tariff F.C.C. No. 259 (WATS) for Advanced 800 Service, Transmittal No. 173, *Memorandum Opinion and Order*, 102 FCC 2d 701 (1984) *(Advanced 800 Service Order)*.

[204] AT&T Reply at 6, *citing* AT&T Tariff F.C.C. No. 2, Section 3.3.3.C.1, p. 69.2.

[205] *See* note 199, *supra*.

[206] *Advanced 800 Service Order*, 102 FCC 2d at 701-2, para. 1.

[207] *See* AT&T Tariff F.C.C. No. 2, Section 3.3.3.C.1, p. 69.2.

[208] We do not address, in this order, the substantive merit, if any, of DYTEL's argument that AT&T's Call Prompter tariff is unreasonably discriminatory. Since Call Prompter is a basic service that is not being used as a component of an AT&T enhanced offering, such discrimination claims are matters for a complaint proceeding, not an ONA plan review. Moreover, if, as AT&T suggests, DYTEL is expressing concern about AT&T's Speech Response Service, we note that AT&T has stated that it has been providing this service pursuant to the *AT&T Limited Waiver Order*, and there is no basis to conclude that AT&T has violated the terms of that waiver in offering Speech Response.

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Filing and Review of Open Network Architecture Plan of AT&T

I concur that AT&T should not be required to unbundle its Accunet Packet Service (APS) into component parts of digital interoffice channels (Dataphone (R) Digital Service or DDS) and packet switching, but not for the reasons stated in the order.

The principal purpose of requiring the unbundling would be to prevent AT&T, as a dominant provider in a noncompetitive DDS market, from putting its APS competitors in a "price squeeze." Such a dominant AT&T could sell DDS to itself at a low rate for the provision of APS and at a higher tariffed rate to competitors for packet switching/protocol conversion services.

However, the market for low and medium speed data transmission services exemplified by DDS now appears to be competitive. Other carriers are offering broadly available DDS-type services. There are also several robust competitors in the very small aperture terminal (VSAT) low and medium speed data transmission business serving as a check on terrestrial DDS rates. Thus, unbundling is unnecessary.[1]

Unfortunately, the best we can say is that the DDS market "appears" competitive. As with other issues of this type *(e.g.,* AT&T's Tariff 12 and Tariff 15 offerings), the Commission lacks a comprehensive and detailed analysis of the state of competition in telecommunications. I would have preferred that we complete Dockets 83-1147 (Long Run Regulation of AT&T) or 86-421 (Decreased

Regulation of Certain Basic Telecommunications Services). Then we would have an assured basis for ruling on this and similar issues.

FOOTNOTE FOR STATEMENT

[1] AT&T's recent tariff filing voluntarily reducing rates for DDS (Transmittal No. 1430, filed December 7, 1988) is also inconsistent with the existence of a "price squeeze" strategy.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-60

In re Applications of

BOLES-AMERICAN INDIAN, A PARTNERSHIP (hereafter Boles-American Indian) — File No. BPH-870803MC

SOUTHWEST EDUCATIONAL MEDIA FOUNDATION OF TEXAS (hereafter Southwest) — File No. BPED-870827MG

AMERICAN INDIAN BROADCAST GROUP, INC., (hereafter AIBC) — File No. BPH-870827NF (PREVIOUSLY DISMISSED)

For a Construction Permit for a New FM Station on Channel 297C2 in Post, Texas

HEARING DESIGNATION ORDER

Adopted: February 16, 1989; Released: March 20, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Settlement Agreement.* AIBC's application was returned as unacceptable for filing by the Chief, FM Branch, on January 28, 1988 because of a discrepancy in the geographic coordinates of the proposed transmitter site as specified in § V-B, Item 2 and plotted on the 7.5 minute U.S.G.S. topographic map. On February 19, 1988, AIBC filed a petition for reconsideration of this action and resubmitted its application along with a curative amendment. On October 5, 1988, AIBC and James G. Boles, the original proponent of BPH-870803MC, filed an agreement with the Commission under which terms AIBC is to: (i) seek dismissal, with prejudice, of the pending petition for reconsideration contesting the return of its application and (ii) pay James G. Boles the sum of three hundred thousand dollars (300,000.00) in exchange for a forty-nine percent (49%) interest in BPH-870803MC, and for one hundred percent (100%) of the assets of KPOS(AM) Post, Texas.

3. We have examined the agreement and find that approval thereof would serve the public interest and that neither application was filed for the purpose of reaching or carrying out the agreement. The applicants have complied with the provisions of Section 311(c)(3) of the Communications Act of 1934, as amended, and Section 73.3525 of the Commission's Rules.

4. Accordingly, pursuant to 0.283 of the Commission's Rules, the joint request is granted, and the February 19, 1988 petition for reconsideration filed by AIBC will be dismissed, as requested.

5. *AIBC's Petition Opposing Reinstatement of Southwest's Application.* 47 C.F.R. § 73.315(a) requires that an applicant provide a minimum field strength of 70 dBu (3.16 mV/m) over the entire principle community to be served. By a *Report and Order* adopted March 4, 1986, the Commission added "note A" to § 73.315(a) which provides that the requirements of that section do not apply to noncommercial educational FM broadcast stations (NCE's). 52 Fed. Reg. 9963, (rel. March 24, 1986). In April of 1987, over one year later, a clarification of note A was published in the Federal Register which then stated that the requirements of § 73.315(a) do not apply to NCE's operating on *reserved* channels[1] (emphasis added). Additionally, the Commission further explained that the purpose of this clarification was to bring § 73.315(a) into conformity with the Commission's original intent regarding city grade coverage for noncommercial educational applicants. 52 Fed. Reg. 10569, (rel. April 2, 1987).

6. Southwest, an educational entity, filed for the instant commercial channel on FCC (educational) Form 340. This Form does not yet require noncommercial educational applicants applying for commercial allotments to indicate distances to or plot the 70 dBu (3.16 mV/m) contour. Consequently, in violation of 47 C.F.R. § 73.315(a), as clarified by note A, the engineering data submitted by Southwest did not contain this information and the application was returned on February 11, 1988. Due to the discrepancy between the requirements of 73.315(a) and Form 340, however, Southwest's omission was not deemed to be fatal on reconsideration. Thus, the application was reinstated on September 9, 1988.

7. On October 11, 1988, AIBC filed a petition for reconsideration challenging the reinstatement of Southwest's application.[2] Essentially, AIBC alleges that since the clarification preceded the filing of Southwest's application, and since this application failed to comply with its requirements, the Commission was compelled to return the application and was without authority to reinstate it. Further, AIBC relies on the Circuit Court's treatment of the Garnerlynn application in *Salzer v. F.C.C.*, 778 F.2d 869 (D.C. Cir., 1985) wherein the Court affirmed our dismissal of an applicant who failed to comply with a new regulation that had been published in the Federal Register, but was not called for in the application. Finally, AIBC charges that reinstatement under these circumstances was tantamount to an "amend[ment] of [our] city grade coverage rules," and, as such, "epitomizes reversible error as arbitrary and capricious, in violation of 5 U.S.C. § 706(2)(A)."

8. We find that AIBC's arguments are without merit. Our decision to reinstate Southwest's application rests squarely on the well known principle that, while the Commission is entitled to impose stringent criteria upon applications, the more exacting the standard, the greater the Commission's obligation to be explicit about any prerequisites for consideration. *Salzer, supra,* at 877. In this regard, it is well settled that, when, as here, the sanction is as drastic as dismissal without any consideration whatever of the merits, elementary fairness compels clarity in the

notice of the material required as a condition for consideration. *See Radio Athens, Inc. (WATH) v. F.C.C.* 401 F.2d 398,404 (1968); *Bamford V. F.C.C.* 535 F.2d 78,82 (1976). Hence, we are mindful of the fact that we cannot reasonably expect applications to be letter perfect if our instructions for those applications are incomplete or ambiguous. *Salzer, supra*, at 875.

9. From March of 1986 until April of 1987, FCC Form 340 appeared to be consistent with note A because it did not call for proof of compliance with § 73.315(a). It was not until April of 1987 when the Commission clarified note A so as to reflect its *original* intent in this area, that the public was placed on notice that the exemption from § 73.315(a) applied only to those NCE's operating on the reserved band. At the publication of this notice, Form 340 and § 73.315(a), as clarified, became inconsistent. In view of this clear conflict, the Commission's decision to reinstate the application and require a curative amendment was a reasonable exercise of its discretion.

10. Finally, AIBC's reliance on the Court's treatment of the Garnerlynn application in *Salzer* is misplaced in view of the fact that in that case the public notice specifically warned applicants that a question eliciting the newly required information was missing from the application form. In this manner, the public notice alerted the public of the change in the regulation, highlighted the apparent inconsistency between the regulation and the official form, and clearly stated that such information was required anyway. This degree of clarity is wholly absent from the matter currently before us.

11. Since the circumstances surrounding the Garnerlynn application are so easily distinguished from the instant matter, we reject AIBC's contention that the approach taken by the Court therein should govern the outcome of this matter. Accordingly, we reject AIBC's arguments as unpersuasive, and having found that Southwest's application was properly reinstated, AIBC's petition for reconsideration will be denied.

12. Notwithstanding the above decision, however, Southwest must still comply with § 73.315(a) and provide a 3.16mV/m signal to the entire proposed city of license. Accordingly, Southwest will be required to file within 30 days of the release of this Order an amendment with the presiding Administrative Law Judge demonstrating compliance with 47 C.F.R. § 73.315(a), or an appropriate issue will be specified by the Judge.

13. *Southwest*. Southwest proposes to locate its antenna on the existing tower which houses KATX(FM)'s translator in Lubbock, Texas. Two-way repeater KNIF-507 is also on this tower. According to the Commission's data base, the overall height of the aforementioned tower (including obstruction lighting) is 442 feet (135 meters). Southwest's tower sketch shows this height to be 440 feet (134 meters). However, in response to Section V-B, Item 5, Southwest has entered 442 feet for the overall tower height. Because Southwest clearly proposes to locate on an existing tower licensed to other Commission licensees, and because specific reference is made to this tower in various places in the application in question, the staff could, "drawing on the application as a whole," confidently verify the overall height of the tower by taking official notice of the tower height found in the Commission's files for the licensed co-located facilities. Accordingly, Southwest's application is found to be acceptable for filing; however Southwest is required to file an amended tower sketch which reflects the correct overall height above ground level (including obstruction lighting) of the tower upon which they intend to mount their proposed antenna.

14. *Boles - American Indian*. Boles submitted a corrective amendment on February 29, 1988 in response to a staff letter dated February 18, 1988. The amendment corrected the antenna height above average terrain (HAAT) of 94 meters as stated in Section V-B, Item 7 of Boles' application. The amendment specified an antenna HAAT of 102 meters. Subsequently, Boles also corrected the overall height above ground and above mean sea level of the existing tower on which he intends to mount his proposed antenna.[3] This amendment, dated July 25, 1988, corrected the tower height discrepancy but included the original value for the antenna HAAT (94 meters). Because Boles did not amend the height of the radiation center or the transmitter location, the staff can confidently ascertain that the antenna HAAT should not have changed. Accordingly, Boles' application is found to be acceptable for filing; however, Boles is required to file an amendment correcting the antenna HAAT discrepancy.

15. The applicant below has petitioned for leave to amend its application on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Boles-American Indian	2/29/88; 7/25/88; (engr.) 10/5/88

16. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

17. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

19. IT IS FURTHER ORDERED, That, the February 19, 1988 petition for reconsideration filed by AIBC contesting the return of its application IS HEREBY DISMISSED. The October 5, 1988 joint request for approval of settlement agreement IS HEREBY GRANTED.

20. IT IS FURTHER ORDERED, THAT the October 11, 1988 petition for reconsideration filed by AIBC contesting the reinstatement of Southwest's application IS HEREBY DENIED.

21. IT IS FURTHER ORDERED, That, Southwest shall file an amendment with the presiding Administrative Law Judge demonstrating that the 3.16 mV/m contour will completely encompass the proposed principle community without major terrain obstruction in compliance with 47 C.F.R. § 73.315(a) within 30 days of the release of this Order.

22. IT IS FURTHER ORDERED, That, Southwest shall file an amendment with the presiding Administrative Law Judge which reflects the correct overall height above ground level (including obstruction lighting) within 30 days of the release of this Order.

23. IT IS FURTHER ORDERED, That, Boles-American Indian shall file an amendment with the presiding Administrative Law Judge correcting the HAAT discrepancy within 30 days of the release of this Order.

24. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Boles-American Indian ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

25. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

26. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

27. IT IS FURTHER ORDERED, That, the applicants herein shall, pursuant to 47 U.S.C. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Channels 200 through 220 are reserved for use by noncommercial applicants.

[2] On October 19, 1988 Southwest filed an opposition to the AICB petition, to which AICB filed a reply on November 7, 1988.

[3] Although the amendment, dated July 25, 1988, was submitted beyond the thirty days after the Notice of Tenderability, the subject matter of the amendment does not affect the acceptability of the proposal and would have been requested as a corrective amendment in this Order. Therefore, for administrative convenience, the amendment will be associated with the application.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-59

In re Applications of

PEMBROKE STATE UNIVERSITY — File No. BP-860728AB
Pembroke, North Carolina
Req: 940 kHz, 1 kW, D

CONTEMPO COMMUNICATIONS, INC. — File No. BP-861013AJ
WLNC, Laurinburg, North Carolina
Has: 1300 kHz, 500 W, D
Req: 940 kHz, 1 kW, 5 kW-LS DA-N U

STEPHEN E. BRISKER — File No. BP-861229AI
Fort Bragg, North Carolina
Req: 940 kHz, 50 kW, DA-D

HEARING DESIGNATION ORDER

Adopted: February 22, 1989; Released: March 20, 1989

By the Chief, Audio Services Division:

1. The Commission, by the Chief, Audio Services Division, acting pursuant to delegated authority, has under consideration the above captioned mutually exclusive applications.

2. *Pembroke State University application.* The Pembroke State University application does not disclose what other broadcast interests, if any, the applicant (or any party to the application) possesses. This omission must be corrected by an Amendment filed with the Presiding Administrative Law Judge within thirty (30) days of the release of this order.

3. *Contempo Communications, Inc. application.* James C. Clark and John W. Pittman, both of whom are officers, directors and shareholders of Contempo Communications, Inc., indicated in their application that they own stock in ProMedia, Inc., the licensee of station WFMO(AM), Fairmont, North Carolina. As engineering data indicated that there would be overlap of the 1 mV/m contours of WFMO(AM) and the new station proposed by this application, Clark and Pittman stated that, in order to avoid the Commission's multiple ownership rules as then constituted, they would sever all connections with WFMO prior to the commencement of program test authority upon a grant of their application. However, recent changes in the Commission's multiple ownership rules incorporate the 5 mV/m contour as the standard for determining possible multiple ownership problems. 53 Fed. Reg. 51,780 (1988) (to be codified at 47 C.F.R. Section 73.3555). Engineering data indicate that there would be no overlap of the 5 mV/m contours of WFMO(AM) and the new station proposed by this application. Hence, the divestiture proposed by Clark and Pittman is unnecessary.

4. The last date (B cut-off) on which Contempo Communications, Inc. could file amendments to its application as a matter of right was June 16, 1987. On June 23, 1987, Contempo Communications, Inc. filed an amendment stating that it will assume responsibility for any harm WLNC's proposed antenna array causes to the nearby WEWO(AM) array. Under Section 1.65 of the Commission's Rules the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Thus, any comparative advantage resulting from the amendment will be disallowed.

5. *Stephen E. Brisker application.* On September 8, 1987, after the June 16, 1987, B cut-off date, Brisker filed an amendment updating his ownership interests in other applications pending before the Commission. The amendment is accepted for filing pursuant to Section 1.65 of the Commission's Rules. However, no comparative advantage may be gained thereby.

6. The Commission has become aware of other changes in the broadcast interests of Mr. Brisker which have occurred since the filing of his application. These changes must be reflected by an amendment filed with the Presiding Administrative Law Judge within thirty (30) days of release of this order.

7. Except as indicated by the issues specified below, all applicants are qualified to construct and operate as proposed. However, since the proposals are for different communities, we will specify an issue to determine, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which proposal would best provide a fair, efficient, and equitable distribution of radio service. We will also specify a contingent comparative issue, should such an evaluation of the proposals prove warranted.

8. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) the areas and populations which would gain or lose primary aural service from the proposal of Contempo Communications, Inc. and the availability of other primary service to such areas and populations, (b) the areas and populations which would receive primary aural service from the proposals of Pembroke State University and Stephen E. Brisker and the availability of other primary service to such areas and populations, and (c) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which proposal would best provide a fair, efficient and equitable distribution of radio service.

2. To determine, in the event it is concluded that a choice between the applicants should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

9. IT IS FURTHER ORDERED, That Pembroke State University and Stephen E. Brisker each file an amendment providing up-to-date information regarding their respective broadcast interests, if any.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Contempo Communications, Inc. and Stephen E. Brisker ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C.

12. IT IS FURTHER ORDERED, That, to avail themselves of an opportunity to be heard, the applicants shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within twenty (20) days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-66

In re Applications of

JO ANNE YATES (hereafter "Yates") — File No. BPH-870729MF

JOHN A. WATKINS (hereafter "Watkins") — File No. BPH-870730MA

BAYLAND RADIO LIMITED PARTNERSHIP (hereafter "Bayland") — File No. BPH-870730MD

LONG BEACH BROADCAST ASSOCIATES (hereafter "Associates") — File No. BPH-870730MG

BEACH BROADCASTING LIMITED PARTNERSHIP (hereafter "Beach") — File No. BPH-870730ML

BADEAN MEDIA FM LIMITED PARTNERSHIP (hereafter "Badean") — File No. BPH-870730MM

MANUEL LIMA (hereafter "Lima") — File No. BPH-870730MP

For Construction Permit
for a New FM Station on Channel 233A
in Long Beach, Mississippi

HEARING DESIGNATION ORDER

Adopted: March 6, 1989; Released: March 20, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. EEO. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Bayland and Beach have filed such statements, they are deficient. Bayland has not listed any specific local recruitment sources for minorities. Beach has specified only one recruitment source for minorities and women, respectively. Accordingly, Bayland and Beach will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

3. *Bayland.* Pursuant to the *Report and Order* in MM Docket No. 87-407, released November 9, 1988, the Commission allotted Channel 234A to Lacombe, Mississippi. The Bayland application is short-spaced to the allotment of channel 234A at Lacombe, Mississippi. Because Bayland's application was filed at a time prior to final grant of the new Lacombe, Mississippi allocation, the applicant will be permitted to amend its application to specify a fully-spaced site. *See Report and Order* in MM Docket 87-407, 3 FCC Rcd 6517 (1988), and *Rayne Broadcasting Company, Inc.*, 2 FCC Rcd 7552 (1987). Accordingly, Bayland will be required to submit an amendment within 30 days of the release of this Order specifying a fully-spaced site to the Lacombe, Mississippi allocation. An air hazard issue will be specified.

4. *Beach.* Stanley Daniels is an announcer and salesperson for WQFX(FM) in Gulfport, Mississippi. Lynn Cole is the sales manager for WLOX(TV), in Biloxi, Mississippi. Daniels and Cole have indicated their intent to terminate their respective relationships with WQFX(FM) and WLOX(TV) in the event of grant of the referenced application. Accordingly, in the event of the grant of the Beach application, Stanley Daniels and Lynn Cole will be required to sever all connections with WQFX(FM) and WLOX(TV) prior to the commencement of program test authority.

5. *Environmental.* Lima proposes to mount his antenna on the WQFX(AM) existing tower. Our study indicates that the operation of the new proposal and the existing WQFX(AM) facilities may significantly exceed the radiofrequency radiation guidelines under 47 C.F.R. §1.1307(b). Accordingly, applicant will be required to amend his application within 30 days of the release of this Order to demonstrate compliance with the radiofrequency radiation guidelines. The applicant must submit a detailed study based upon OST Bulletin No. 65, (October 1985) entitled "Evaluating Compliance with FCC Specified Guidelines for Human Exposure to Radiofrequency Radiation." This study must include the cumulative effects of the proposed operation and the WQFX(AM) operation. If a fence is to be built, the applicant must give the distance from the base of the tower to the fence. Since the proposal of applicant may have a significant environmental impact as defined by 47 C.F.R. §1.1307, the applicant is required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, Lima will be required to file within 30 days of the release of this Order an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), recon. denied sub nom *Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

6. Bayland petitioned for leave to amend its application on November 4, 1988. The accompanying amendment was filed after October 14, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative

position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

7. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Bayland would constitute a hazard to air navigation.

2. If a final environmental impact statement is issued with respect to Lima in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Bayland and Beach shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

11. IT IS FURTHER ORDERED, That, Bayland shall file an amendment, as specified in Paragraph 3 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That, in the event of grant of Beach's application, Stanley Daniels and Lynn Cole will be ordered to divest themselves of all interests in and sever all connections with Station WQFX(FM) and WLOX(TV), respectively, prior to the commencement of program test authority.

13. IT IS FURTHER ORDERED, That in accordance with paragraph 5 hereinabove, Lima shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

14. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Bayland IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

15. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

16. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MUNICIPALITY OF ANCHORAGE
d/b/a ANCHORAGE TELEPHONE UTILITY,
Complainant,

v. File No. E-87-35

ALASCOM, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: March 10, 1989; Released: March 20, 1989

By the Chief, Common Carrier Bureau:

1. On January 20, 1987, the Municipality of Anchorage, d/b/a Anchorage Telephone Utility (ATU), filed a formal complaint against Alascom, Inc. (Alascom) pursuant to section 208 of the Communications Act (the Act),[1] alleging that Alascom had violated sections 201(b) and 202(a) of the Act.[2] ATU seeks a finding that Alascom owed it more than $18 million in connection with Alascom's provision of interstate toll telephone calls from January 1, 1980 to the effective date of ATU's interstate tariffed access charges.[3] Alascom has denied that it violated the Act and has counterclaimed that ATU, in violation of Part 67 of the Commission's rules,[4] unlawfully deprived it of $30 million in interstate and intrastate revenues.

2. At the request of the staff, the parties briefed the issue whether portions of ATU's complaint and Alascom's counterclaim are barred by the two-year statute of limitations set forth in section 415 of the Act, 47 U.S.C. § 415. Both parties urge expedited consideration and determination of that question.[5] We concur that resolution of the statute of limitations issues should result in closing the differences between the parties and substantially enhance the possibility of a negotiated settlement of the pending litigation. Accordingly, this order addresses and resolves such issues.

I. BACKGROUND

3. ATU is a municipal corporation organized under the laws of the State of Alaska and engaged in providing local exchange common carrier services in Anchorage, Alaska. Alascom provides common carrier interexchange telecommunications services within Alaska and, together with AT&T, to points in the other 49 states. ATU currently provides, and for many years provided, Alascom with equipment, facilities, and services which allow Alascom to provide its services to the public. This proceeding grows out of a longstanding dispute between the parties over toll revenues derived in connection with Alascom's use of ATU's local telephone plant for originating and terminating interstate and international telephone calls within ATU's local service area.

A. *Alascom's Complaint Before the APUC*

4. On February 4, 1986, Alascom filed a formal complaint against ATU before the Alaska Public Utilities Commission (APUC) which raised substantially identical issues as the division of revenues (settlements) issues raised in ATU's complaint before this Commission, except that the APUC proceeding was focused on intrastate calls and an intrastate, rather than interstate, rate of return.[6] Alascom's complaint, as amended, before the APUC alleged that ATU owed it more than $30 million in interstate and intrastate revenues which ATU had collected for Alascom, net of toll settlements due to ATU, for the period 1980 through 1985. In May 1987, the APUC ordered ATU to make substantial revisions to its cost studies used to determine the amount of settlements with Alascom because of errors found therein.[7] The APUC subsequently required ATU to pay more than $22 million as the minimum amount of intrastate settlements improperly retained for that period. APUC Order No. 11 (December 18, 1987) (reproduced as Alascom Brief Exhibit S).

B. *Alascom's Complaint Before the U.S. District Court*

5. On February 4, 1986, Alascom also filed a complaint against ATU in the United States District Court for the District of Alaska (the court), seeking injunctive relief against ATU for allegedly misapplying its interstate access charge tariff. Following the court's grant of a preliminary injunction directed against ATU, Alascom filed an amended complaint with the court. In addition to the mandatory injunction sought in its original complaint, Alascom sought damages for alleged willful violation of ATU's tariff, damages for ATU's refusal to provide private line service in alleged violation of sections 201 and 202 of the Act (as to which the mandatory injunction claim also pertained), and damages for tortious interference with present and/or prospective business relations. On March 13, 1986, ATU counterclaimed that Alascom owed it more than $18 million under agreements concerning settlements between the parties for the period January 1, 1980 through December 31, 1984.

6. In denying ATU's motion for a stay and partial dismissal of Alascom's complaint, the court concluded that the issues raised therein did not warrant referral to the Commission under the doctrine of primary jurisdiction. However, in granting Alascom's cross-motion to dismiss ATU's counterclaim, the court concluded that the settlements issues raised in the counterclaim were complex and more properly within the purview of this Commission.[8] The court did not retain jurisdiction and found that the Commission "has jurisdiction to hear and decide the entirety of the pre-tariff separations and [interstate] settlement dispute between the parties and award such damages, if any, to which ATU may be entitled."[9] The *Court Order* dismissing ATU's counterclaim was adopted on October 23, 1986 and became final on November 24, 1986.[10] ATU subsequently filed the instant complaint before the Commission. The complaint makes essentially the same claims as those contained in the counterclaim dismissed by the court, *i.e.*, that Alascom owned ATU more than $18 million under agreements concerning settlements for the years 1980 through 1984.

C. ***Compensation Arrangements for Alascom's Use of ATU's Facilities***

7. Under the procedures employed by ATU and Alascom during the time period here relevant, ATU collected interstate toll charges from Alascom's customers on Alascom's behalf, retained the amounts it asserted were called for by interim settlements, and remitted the balance to Alascom. Occasionally, adjustments were made to the factors used in calculating ATU's compensation and the amounts retained by ATU were thereby changed. During the period 1980 - October 15, 1984, it appears that ATU collected $185,200,455 in interstate toll charges, remitted $45,571,653 to Alascom, and retained $139,628,802 (including18 million allegedly due in settlements) in respect of interstate services provided under the parties' agreements.[11]

8. An important factor employed in determining ATU's compensation was the rate of return allowable to ATU under the settlement Agreements for both interstate and intrastate purposes. It was the expectation of the parties that there would be a fixed rate of return determined prior to the beginning of each year which would be applied throughout the year.[12] For the first year under each agreement (*i.e.*, 1979 for the Traffic Agreement and 1980 for the Special Services Agreement), the rate of return specified in the parties' Agreements was 9.55 percent.[13] The primary issue on which the parties thereafter were unable to agree was an appropriate rate of return for years subsequent to the initial year of each agreement.[14] Such failure precluded completion of finalized cost studies and settlements for the years 1980 through 1985.

II. CONTENTIONS OF THE PARTIES

9. Alascom asserts that ATU's complaint is barred in its entirety by the applicable statute of limitations in the Act, *i.e.*, 47 U.S.C. § 415. According to Alascom, subsection (a) of the statute is controlling because ATU is, and at all times here relevant was, a carrier rendering facilities and services to Alascom under section 201 of the Act and because ATU is seeking to recover lawful charges for services rendered.[15] On the other hand, ATU maintains that its complaint is not an action for recovery of lawful charges within the meaning of subsection (a) and that subsection (b) is the appropriate statutory provision.[16] ATU maintains that the term "lawful charges" in section 415(a) emcompasses only lawfully tariffed charges filed pursuant to section 203(a) of the Act.[17] Because it had no FCC tariff covering the provision of any interstate service to Alascom under which it could have sought to recover lawful charges during the period encompassed by the Agreements, ATU argues that section 415(a) therefore is inapplicable. ATU also relies in this connection on *Atlantic Coast Line R. Co. v. Baltimore & Ohio R. Co.*, 12 F. Supp. 711 (D. Md. 1935) and *Thompson v. St. Louis-San Francisco Ry. Co.*, 218 F.2d 166, 172 (8th Cir. 1954) *cert. denied*, 348 U.S. 964 (1955) (*Thompson*).[18]

10. ATU asserts, *inter alia*, that it had no cause of action until Alascom breached the Agreements in January 1986. At that time, Alascom formally withdrew all offers and proposals for a negotiated resolution of the parties' dispute and advised ATU of its view that it was "necessary to pursue resolution of our outstanding differences before the appropriate regulatory bodies and courts . . . ."[19] In ATU's view, even if its cause of action accrued before 1986, but not earlier than May 9, 1984, its complaint was timely filed because its counterclaim, which commenced an identical cause of action in the court on March 13, 1986, tolled the statute of limitations for 256 days, the period its counterclaim had been pending before the court.

11. Additionally, ATU asserts that even if its complaint is not considered to have been timely filed, Alascom nevertheless would be estopped from raising the defense of the statute of limitations because ATU reasonably relied on Alascom's apparent willingness to negotiate settlements for 1980 through 1985 and was induced not to file any action against Alascom. Finally, ATU argues that it also would be inequitable to bar its complaint with respect to interstate settlements because Alascom's claims before the APUC with respect to intrastate settlements for the same 1980-1985 period are currently being considered. ATU asserts that to allow disparate time frame treatments of settlements in the state and federal jurisdictions would be inappropriate because of the interrelationship between the settlements process in the two jurisdictions and the historical practices of the parties.

12. On the other hand, Alascom asserts, *inter alia*, that ATU was aware of all of the facts upon which its complaint is based no later than November of 1984. Alascom further asserts that section 415 is jurisdictional in nature, must be construed strictly, and constitutes a bar to both ATU's complaint and Alascom's counterclaim.[20] According to Alascom, ATU's cause of action, if any, accrued when ATU provided it with service, or even earlier when Alascom allegedly breached the Agreements by refusing to negotiate rates of return for years subsequent to 1980, prior to each upcoming year, as the Agreements contemplated. Alascom further asserts that any election by ATU not to commence timely action was at its own choice and peril and did not toll the statute of limitations.

13. Alascom disagrees with ATU's claim that the filing of ATU's counterclaim in the court tolled the statute and asserts that there is no statutory basis for such a conclusion. Moreover, even if the statute had been tolled by that event, Alascom asserts that ATU failed to file timely its complaint with the Commission, noting that it was not filed until eighty-nine days after the court had dismissed ATU's counterclaim. Alascom also disagrees with ATU's claim that its cause of action was deferred because of on-going negotiations between the parties. Finally, Alascom asserts that no circumstances exist that would warrant application of the doctrine of equitable estoppel against its raising the statute of limitations as a bar to ATU's complaint.

III. DISCUSSION

14. We note at the outset that we do not here reach the issue of whether ATU has met its burden of showing that Alascom violated sections 201 and 202 of the Act as it has alleged.[21] Rather, we focus solely on the statute of limitations issue. The purpose of a statute of limitations is "to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed."[22] Moreover, the statute of limitations contained in the Act, *i.e.*, section 415, is not discretionary and the lapse of time beyond the limitation period not only bars the remedy but also destroys the liability.[23] Accordingly, insofar as ATU seeks $18.3 damages for alleged violations of the Act incurred during

periods more than two years from the date of filing, it appears that its complaint must be dismissed to the extent that section 415 is applicable.

A. ***The Applicable Statute of Limitations***

15. ATU asserts that the two-year statute of limitations in section 415 of the Act may be inapplicable in a case, as here, between two carriers concerning settlements or payments allegedly due pursuant to agreements of the carriers. ATU further asserts that a six-year Alaskan statute of limitations on contractual matters may apply in the absence of an applicable federal statute.[24] ATU relies in this connection on *Thompson, supra*, which interpreted former section 16(3) of the Interstate Commerce Act,[25] after which section 415 is modeled. *Thompson* involved settlements arising out of a joint through rate of three rail common carriers. The Eighth Circuit opined that provisions in section 16(3) "seem to contemplate actions or complaints between carriers and shippers, and not between carriers only."[26] However, the Interstate Commerce Commission (ICC) subsequently disagreed with that interpretation and held that the statute of limitations applied to actions between carriers as well.[27] The ICC's interpretation of its own governing statute is entitled to deference and considerable weight and was found by the Seventh Circuit court to be the better-reasoned view.[28] We conclude, on this basis, that section 415 is applicable to a carrier's complaint against another carrier alleging violations of the Act or Part 67 of the Commission's rules.[29]

B. ***The Relevant Statute of Limitations Provision***

16. As previously noted (para. 9, *supra*), the parties disagree as to which subsection of the statute of limitations, if any, is relevant and controlling in this matter. In resolving this issue, it is important to focus on the precise cause of action, *i.e.*, the alleged violations at the heart of ATU's complaint. We find, based on the record, that the gravamen of ATU's complaint is an alleged violation of sections 201(b) and 202(a) of the Act due to Alascom's failure to agree on the proper application of Part 67 of the Commission's rules and Alascom's failure to agree on an appropriate rate of return for compensating ATU for Alascom's use of its plant, as the parties' Agreements contemplated. This is not a case involving "overcharges" as that term is defined for purposes of section 415.[30] Neither party has alleged that the other has insisted on receiving greater compensation for interstate communication than any applicable charge tariffed at the Commission (*i.e.*, overcharges) in violation of section 203(c) of the Act.[31] Accordingly, Alascom is not correct in concluding that its counterclaim against ATU is for recovery of "overcharges for carriage service" and that section 415(c) of the Act, which covers overcharges, applies thereto.[32]

17. Further, contrary to Alascom's assertion, ATU's complaint also is not encompassed by 47 U.S.C. § 415(e).[33] This proceeding is essentially a dispute over alleged breaches of contracts and violations of Commission rules concerning carrier-to-carrier settlements with respect to interstate toll calls. It is not a dispute over Alascom's transmission, or failure to transmit properly, any such call for any subscriber for its service. Alascom's reliance on cases between a shipper and a carrier under the Interstate Commerce Act for its assertion that section 415(e) is relevant is misplaced. Section 415(e) is concerned with a carrier's liability to its customer for failure to transmit a message in accordance with its common carrier obligations. Here, however, ATU is not complaining as a customer of Alascom's common carrier service and its relationship with Alascom is not analogous to that of a shipper.

18. Alascom concludes, incorrectly, that section 415(a), which applies to "all actions at law by carriers for recovery of their lawful charges",[34] controls the disposition of ATU's complaint. The complaint ATU filed with the Commission is not an "action at law" within the meaning of 47 U.S.C. § 415 which refers to a suit instituted by a carrier in a district court of the United States to recover charges due from a customer subscribing to its service.[35]

19. In sum, ATU's section 208 complaint is neither an "action at law" for recovery of "lawful charges" within the meaning of section 415(a), nor a complaint for damages based on "overcharges" within the meaning of section 415(c). Accordingly, by process of elimination and reading of the statute, we agree with ATU that the relevant statutory provision is, therefore, section 415(b), which is concerned with complaints "filed with the Commission" "against carriers for the recovery of damages not based on overcharges . . . ."[36] Contrary to Alascom's contention that it is not a "carrier" for purposes of the parties' relationship in this proceeding,[37] we conclude that the record shows this proceeding indeed involves a dispute between two carriers[38] over the proper application of Part 67 of the Commission's rules. We conclude that the relevant subsection of the statute of limitations, with respect to both ATU's complaint and Alascom's counterclaim, is section 415(b) of the Act.

C. ***Accrual of Cause of Action***

20. Section 415(b) generally precludes the filing of a complaint for damages with the Commission that is based on a cause of action that accrued more than two years before the complaint is filed. While the Act itself does not specify the point of accrual of the cause of action, the Commission has determined that the cause of action which commences the limitation period "accrues when the carrier does the unlawful act or fails to do what the law requires, on account of which damages are claimed" *citing* a ruling of ICC, the authoritative interpreter of former section 16(3)(b) of the Interstate Commerce Act, on which section 415(b) is based.[39] The cause of action on which ATU's instant complaint is based derives from the parties' inability to agree on an appropriate interstate rate of return and other settlements factors to compensate ATU for Alascom's use of its facilities in conjunction with Alascom's provision of interstate service. Alascom asserts that ATU knew or should have known as of November 29, 1984, at the very latest, that Alascom disagreed with its methodologies for determining the interstate rate of return, count for local loops, and annualized traffic factors to be employed in ATU's cost studies and that Alascom viewed ATU's cost study for the year 1980 as failing to comply with Part 67 of the Commission's rules. According to Alascom, therefore, even if section 415(e) is inapplicable,[40] ATU's several causes of action all accrued more than two years before ATU filed its complaint on January 20, 1987. On the other hand, ATU contends that its cause of action did not accrue until January of 1986 when Alascom withdrew all offers to settle their dispute and terminated negotiations in favor of its legal recourses.

21. The record is clear that although the parties held differing views of the proper methodology to determine the primary issue of an appropriate rate of return, both

before and during the relevant 1980-1985 period, their Agreements provided that they would agree on the rate of return prior to each actual study year.[41] It also is clear that the parties' failure to do so was responsible, in large part, for their inability to effect final settlements. Accordingly, we cannot conclude, as ATU urges, that, as of January 20, 1985, "no substantial dispute had arisen which could have alerted ATU that anything was amiss in the toll settlements process."[42] ATU knew, or certainly should have realized, as early as December 31, 1979, that the parties' failure to reach agreement on a rate of return for the upcoming year, whether or not it constituted a breach of contract, constituted a significant problem, if ATU truly believed that the methodology Alascom sought to apply was unjust or unreasonable under the Act or the Commission's rules.

22. The pursuit of negotiations looking toward a possible settlement of outstanding differences does not, in and of itself, generally stay or toll operation of the statute of limitations.[43] If ATU was unhappy with the manner in which Alascom was interpreting the Commission's rules or with the interstate rate of return it or Alascom believed appropriate, it always had the options of cancelling the Agreements, seeking rulings from the Commission as to the proper application of the governing Part 67 Rules under the Agreements or what constitutes a reasonable rate of return pursuant to a petition for declaratory ruling or filing a complaint pursuant to section 208 of the Act. ATU failed to do any of these. We conclude that to the extent that ATU's cause of action, if any,[44] is based on Alascom's insistence on and use of an alleged unreasonable methodology for determining an appropriate rate of return, it accrued not later than early in each relevant year, when it became clear that the parties insisted on using different methodologies for settlements purposes.[45] ATU was aware of all such disagreements with respect to MTS service, and all but four months of private line service, prior to 1984.[46] This was more than two years before it filed its complaint with the Commission on January 20, 1987.

D. *Tolling of Statute of Limitations*

23. The construction of section 415 by the Commission and the federal courts has been strict and exceptions to its application have been confined to narrow circumstances.[47] In *Bunker Ramo*, *supra*, the Commission's Review Board identified two basic situations in which the strict application of the statute may be affected:

> First, a statute of limitations does not begin to run until discovery of the right or wrong or of the facts on which such knowledge is chargeable in law. Secondly, the running of the period of limitations may be suspended or tolled by various causes; for example, although mere ignorance will generally not toll the statute, active fraudulent concealment by a defendant will generally do so.[48]

The Review Board stated that "a defendant should not be permitted to interpose the statutory time limit as a defense where his conduct is the primary reason for the tardiness of the plantiff's action."[49] Thus, even though section 415, like the former Interstate Commerce Act provisions upon which it is modeled, is a substantive and jurisdictional statute of limitations,[50] the period of limitations may nevertheless be tolled in limited circumstances.

24. ATU asserts that because its counterclaim in court commenced an identical cause of action as the instant complaint, the statute of limitations was tolled during the pendency of its counterclaim, *i.e.*, from March 13, 1986, when it was filed, until November 24, 1986, when the *Court Order* dismissing the counterclaim became final. Without any supporting legal documentation, ATU further asserts that its complaint was timely filed for any cause of action that accrued on or after May 9, 1984, because of the 256 days that its counterclaim was pending before the court.[51] ATU also contends that tolling of the statute of limitations is appropriate in the circumstances because it was legally constrained from pursuing its remedies simultaneously before both the court and the Commission by section 207 of the Act.[52] As previously noted (para. 13, *supra*), Alascom disagrees that the filing of ATU's counterclaim tolled section 415, asserting that there is no statutory basis for such a conclusion.

25. In *Bunker Ramo*, a case relied on by ATU, the Review Board found that section 415(b), both by its terms and as it has been construed in past proceedings, applies exclusively as a bar to the recovery of damages and does not bar other forms of relief.[53] Thus, the pendency of ATU's counterclaim before the court operated as a bar only to its seeking damages for the same cause of action simultaneously before both the court and the Commission. ATU has not shown that it was precluded from filing a complaint seeking relief other than damages.

26. In any event, even if ATU's counterclaim and section 208 complaint were based on an identical cause of action and we assumed, *arguendo*, that the statute of limitations was tolled until November 24, 1986 (when the *Court Order* dismissing the counterclaim became final), ATU's complaint was not filed until January 20, 1987, more than two months thereafter and more than two years after its cause of action had accrued. (*See* paras. 21, 22, *supra*). Contrary to ATU's contention, in the absence of a statute to the contrary, a party cannot deduct from the period of the statute of limitations the time during which a prior action ultimately dismissed without prejudice was pending.[54] The court's dismissal of ATU's counterclaim without prejudice left the situation, so far as procedures are concerned, the same as though the counterclaim had never been brought.[55] Accordingly, we conclude that ATU's complaint for damages with respect to MTS service is barred under section 415(b) of the Act. ATU waited nearly three months after the *Court Order* issued before filing its complaint. No reason appears on the record why the complaint could not have been filed after the *Court Order* issued but before the court's order became final on November 24, 1986. ATU had knowledge of the material facts necessary to establish its cause of action with respect to the parties' failure to agree to a rate of return for MTS service for each relevant year more than two years before it filed its complaint. It has not shown that the delay in filing its complaint beyond the time limitation of section 415 was fraudulently induced by any affirmative misconduct on the part of Alascom. Accordingly, ATU's election to delay the filing of its complaint until January of 1987 was at its peril.

E. *Equitable Estoppel*

27. ATU argues that even if its complaint was not timely filed and Alascom's conduct did not amount to fraudulent concealment, Alascom nevertheless should be estopped from raising the statute of limitations as a de-

fense to the complaint because ATU reasonably interpreted Alascom's conduct until January 30, 1986, to be a good faith attempt to reach an agreement settling the dispute. ATU asserts that in reliance on Alascom's conduct, it did not seek to file a lawsuit or complaint, but continued to negotiate in good faith until Alascom broke off negotiations on January 30, 1986. Relying on *Armstrong, supra*, 25 FCC 2d 385 (1970), ATU asserts that "the Commission has determined that the point in time at which a cause of action accrues may be deferred by negotiations between parties".[56] On the other hand, Alascom asserts that the Commission never has held that accrual of a cause of action may be deferred by negotiations between parties and that *Armstrong* does not support ATU's claim. Relying on *Midstate, supra*, 320 U.S. at 357-58, Alascom notes that the Supreme Court there held that a written agreement to extend the limitations' period was invalid as contrary to the intent and effect of the statute, and that the running of the statute extinguished both the cause of action and jurisdiction to hear the claim.

28. If a written agreement is ineffective in tolling the statute, certainly oral discussions which contained no agreement to toll the statute are insufficient. We have closely reviewed the *Armstrong* case and find that ATU's reliance thereon for its claim that the Commission has determined that a cause of action may be deferred by negotiations between the parties is without basis. The Commission there determined that the complainant's cause of action, if any, arose in 1965, and that there was no basis for any claim that the defendant engaged in any allegedly unlawful conduct after 1965. Because the complaint for damages had not been filed until 1970, and in the absence of any allegation that the defendants had practiced fraud or deceit to prevent the complainant from becoming aware of the facts which were the basis of its claim, the Commission determined that it had no choice but to dismiss the complaint as barred by section 415(b).[57] The fact that the parties previously had negotiated unsuccessfully over a period of years was not material to the Commission's resolution of the statute of limitations issue.

29. ATU relies further on *Naton v. Board of California*, 649 F.2d 691 (9th Cir. 1981), in support of its assertion that Alascom is estopped from reliance on the defense of the statute of limitations here because of "indications that [Alascom] may have acted in bad faith to delay or avoid suit."[58] On the other hand, Alascom asserts that no circumstances exist here warranting application of the doctrine of equitable estoppel, even if such doctrine were applicable under the Act. Alascom relies on *Wisconsin Bridge & Iron Co. v. Illinois Terminal Co.*, 88 F.2d 459, 461 (7th Cir. 1937) (an estoppel can not apply to create a jurisdiction which had ceased to exist under the Interstate Commerce Act) in support of its claim that the doctrine of equitable estoppel may not be invoked in this proceeding.

30. ATU's reliance on *Naton v. Board of California, supra*, is also misplaced. In that proceeding, the Ninth Circuit found that the statute of limitations there involved,[59] unlike section 415 of the Act, was not jurisdictional and thus subject to equitable modification. The concept of tolling of a statutory period on equitable grounds is usually very much restricted, especially when, as here, the statutory filing period is jurisdictional.[60] Section 415 is to be construed in light of Congressional intent[61] and the Commission and the courts have consistently held that section 415 is jurisdictional and must be applied even if to do so produces hardships.[62] Moreover, we are not persuaded by ATU's arguments in support of its assertion of possible bad faith since there is little or no convincing record support for such assertions. For example, ATU cites Alascom's rescission of the traffic factors for 1980 and 1981, more than a year after it had agreed to them, as an example of Alascom's conduct which might be construed as indicating lack of good faith.[63] However, as the APUC noted, the traffic factors to which Alascom agreed for 1980 and 1981 were incorrect and Alascom's approval thereof mistaken.[64] Corrected traffic factors should be used because, as the APUC further noted, the mistake "would carry over into future years and result in allocations contrary to that intended by the FCC."[65] ATU has convincingly shown neither that Alascom fraudulently concealed facts that were relevant and material to the alleged violations of the Act nor that Alascom misrepresented, either intentionally or unintentionally, any such facts to ATU. Even if Alascom may have offered other carriers higher rates of return than the rate offered to ATU, that, in and of itself, would not establish that such rate was unjust, unreasonable or unduly discriminatory. Risk and other factors in determining an appropriate rate of return may vary for publicly-owned and private companies. Moreover, rate of return is only one factor in determining the appropriate amount of settlements and a high or low rate could be offset by other negotiated factors.

31. Finally, ATU argues that because Alascom claimed that its complaint before the APUC was not barred by the statute of limitations and because the APUC considered the intrastate issues for the entire period 1980 to 1985, "[t]he interstate portion of the settlements dispute for that entire period must similarly be adjudicated by the Commission in order to avoid an absurd result: the partial and inconsistent adjudication of the parties' settlements disputes by effectively ignoring most of the interdependent interstate component altogether."[66] According to ATU, "[g]iven the nature of separations and the close interrelationship between the intrastate and interstate functions, combined with the Federal position of preemption in the area, the Commission should adjudicate the interstate portion of the dispute over the same time period addressed by the APUC. [67] On the other hand, only after ATU became aware that it was not doing as well at the APUC proceeding as it had hoped, did it approach the Commission with an interstate claim for the18 million sought therein. According to Alascom, "Having made its choices, ATU cannot now be heard to invoke equity to save itself from their consequences."[68]

32. Even though jurisdictional separations procedures for interstate ratemaking and intrastate ratemaking are "two sides of the same coin", *Hawaiian Telephone Co. v. PUC of Hawaii*, 827 F.2d 1264, 1275 (9th Cir. 1987), it does not necessarily follow that plant and equipment used to provide both interstate and intrastate communication services may not be subject to different federal and state regulatory regimes.[69] The rates of return approved at the federal and state levels for interstate and intrastate service, respectively, also need not necessarily be identical and have varied. Similarly, even if, *arguendo*, different statutes of limitations may be applicable at the federal and state levels, that would not deprive ATU of an opportunity to earn a fair rate of return or necessarily lead to an unjust or unreasonable result. ATU's reliance on *Hawaiian Tele-*

phone, supra, is thus misplaced. Even though the fact that application of section 415 of the Act may result in hardship in some instances does not mean Congress intended that the statute be tolled or that a defendant may be estopped from reliance thereon.

33. In view of the foregoing, we conclude that no circumstances have been shown that warrant application of the doctrine of equitable estoppel against Alascom's reliance on the statute of limitations as a bar to ATU's complaint.

IV. CONCLUSION

34. ATU's complaint and Alascom's counterclaim are dismissed as barred by the statute of limitations under section 415(b) of the Act to the extent that they seek the recovery of damages for alleged violations of the Communications Act or the Commission's rules based on causes of action that accrued before January 20, 1985, and March 16, 1985, respectively. Our determination of the statute of limitations issues involved in this proceeding, which both parties requested, should enhance the possibility of a negotiated resolution of their dispute. The parties are directed to negotiate in good faith looking toward the accomplishment of such end with the assistance and cooperation of the Enforcement Division.

V. ORDERING CLAUSES

35. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 208 and 415(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208 and 415(b), and authority delegated under section 0.291 of the Commission's Rules and Regulations, 47 C.F.R. § 0.291, that the Complaint filed by the Municipality of Anchorage, d/b/a Anchorage Telephone Utility, on January 20, 1987, and the Counterclaim filed by Alascom, Inc. on March 16, 1987, ARE DISMISSED to the extent they seek damages based on causes of action which accrued before January 20, 1985, and March 16, 1985, respectively, and otherwise SHALL BE HELD IN ABEYANCE insofar as violations of the Communications Act and Commission Rules are alleged.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] 47 U.S.C. § 208 provides, in pertinent part, as follows:

> [a]ny person, any body politic or municipal organization . . . complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission . . . .

[2] 47 U.S.C. § 201(b) provides, in pertinent part, that any charge, practice, classification, or regulation for and in connection with interstate or foreign communication that is unjust or unreasonable is unlawful. Under 47 U.S.C. § 202(a), it is also unlawful:

> for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

[3] ATU's charges for switched access and special access services are contained in its Tariff F.C.C. No. 4 and became effective on October 15, 1984, and April 22, 1985, respectively.

[4] Part 67 of the Commission's rules contains jurisdictional separations procedures for separating telephone property costs, revenue expenses, taxes and reserves between the state and federal jurisdictions.

[5] Letter from Francis E. Fletcher, Jr. to Deputy Chief, Enforcement Division (Mar. 14, 1988) and letter from Alan Y. Naftalin to Deputy Chief, Enforcement Division (Mar. 16, 1988). The following pleadings concerning the statute of limitations issues are here before us for consideration: a brief filed by ATU on November 25, 1987; a revised Appendix 1 filed by ATU on November 30, 1987; a brief filed by Alascom on December 23, 1987; a reply brief filed by ATU on January 19, 1988; a supplemental brief filed by Alascom on January 25, 1988; findings of fact and conclusions filed by ATU on November 18, 1988; reply findings of fact and conclusions filed by Alascom on December 8, 1988; a motion to accept response and a response, both filed by ATU on December 22, 1988; and an opposition to ATU's motion filed by Alascom on January 5, 1989.

[6] The 1971 NARUC-FCC Cooperative Committee on Communications, Separations Manual (1971 ed.) (OZARC Manual), incorporated by reference in section 67.1 of the Commission's rules, contained the applicable principles and procedures for determining jurisdictional separations for purposes of both interstate and intrastate settlements. Compensation for use of local exchange facilities in providing interstate services now are governed by Parts 36 and 69 of the Rules and made in accordance with interstate access services tariffs filed with the Commission. *See* 47 C.F.R. § 69.1 and the Commission's Access Charge Decision, 93 FCC 2d 241 (1983), *modified*, NARUC v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[7] Alascom, Inc. v. Municipality of Anchorage d/b/a Anchorage Telephone Utility, Docket No. U-86-12 (Order No. 7, May 29, 1987) (APUC Order).

[8] Alascom, Inc. v. Municipality of Anchorage, d/b/a Anchorage Telephone Utility, No. A86-073 (D. Alaska Oct. 23, 1986) (*Court Order*).

[9] *Id.*, slip op. at 19. The court also noted the pendency before the APUC of the proceedings regarding intrastate settlements. *Id.*, slip op. at 18 n.2.

[10] Fed. R. App. P. 4(a) (1987); Fed. R. Cir. P. 6(a) (1987); *see* ATU Brief at 4, n.5.

[11] The settlements process for interstate services provided by Alascom with use of ATU facilities was the subject of two agreements executed by the parties on September 12, 1979, *i.e.*, an agreement with respect to MTS, effective retroactively to January 1, 1979 (the Traffic Agreement) and an agreement with respect to private line services, to be effective January 1, 1980 (the Special Services Agreement) (collectively referred to herein as the Agreements).

[12] APUC Order, *supra See also* Traffic Agreement, Exhibit C at 9 (reproduced at page 20 of Exhibit 1 to ATU's Brief); Special Services Agreement, Exhibit C at 5 (reproduced at page 12 of Exhibit 2 of ATU's Brief).

[13] The Agreements did not distinguish between an interstate and intrastate rate of return in this regard.

[14] Letter from Tony Knowles to Charles E. Robinson (Jan. 29, 1986) (copy attached as Exhibit 27 to ATU's Brief).

[15] 47 U.S.C. § 415(a) provides as follows:

> All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun, within two years from the time the cause of action accrues, and not after.

[16] 47 U.S.C. § 415(b) provides, in pertinent part, that "all complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after . . . ." The term "overcharges" is defined as "charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g).

[17] 47 U.S.C. § 203(a) requires certain carriers engaged in interstate and foreign wire or radio communications to file tariffs, or schedules of the charges, classifications, regulations and practices for such communication, with the Commission.

[18] These cases stand for the proposition that disputes between carriers for accounting of division of joint transportation revenues do not involve "charges" within the meaning of section 16(3)(a) of the Interstate Commerce Act.

[19] Letter from Charles E. Robinson to The Honorable Tony Knowles (Jan. 30, 1986) (reproduced in Alascom's Brief as Exhibit 28).

[20] According to Alascom, 47 U.S.C. § 415(c) is applicable to and bars its own counterclaim. 47 U.S.C. § 415(c) provides as follows:

> For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include two years from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

Subsection (d) provides as follows:

> If on or before expiration of the period of limitation in subsection (b) or (c) a carrier begins action under subsection (a) for recovery of lawful charges in respect of the same service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

[21] In a complaint proceeding, the burden of proof lies with the complainant to show a violation of the Communications Act or the Commission's rules. GSA v. AT&T, 2 FCC Rcd 3574, 3579 at n.31 (1987); Armstrong Utilities, Inc. v. General Telephone Co. of Pa., 25 FCC 2d 385, 390 (1970) (*Armstrong*).

[22] Bunker Ramo Corp., 31 FCC 2d 449, 453 (1971) (*Bunker Ramo*).

[23] *Armstrong*, *supra*, 25 FCC 2d at 390; *see* Midstate Horticultural Co. v. Pennsylvania R. Co., 320 U.S. 356, 363-64 (1943) (*Midstate*); Kansas City So. R. Co. v. Wolf, 261 U.S. 133 (1923).

[24] Reply Brief at 10 n.8.

[25] Section 16(3) is now codified as 49 U.S.C. § 11706.

[26] *Thompson*, *supra*, 218 F.2d at 172, *citing* Atlantic Coast Line R. Co. v. Baltimore & Ohio R. Co., *supra*, 12 F. Supp. at 718.

[27] Bangor and Aroostook Railroad, 356 I.C.C. 749 (1977), *aff'd on other grounds sub nom.* Bangor & Aroostook R.R. v. ICC, 574 F.2d 1096 (1st Cir.), *cert. denied*, 439 U.S. 837 (1978) (*Bangor*); *followed* Chicago & North Western Transportation Co. v. Atchison, Topeka & Sante Fe Railway Co., 609 F.2d 1221, 1226 (7th Cir. 1979); *see also* Maine Central Railroad Co. v. Amoskeag Co., 360 I.C.C. 147, 155 (1979).

[28] Chicago & North Western Transp. Co., *supra*, 609 F.2d at 1226. (Section 16(3)(a) applies to actions between carriers as well as between shippers and carriers).

[29] *See* Aetna Life Insurance Co. v. AT&T, 3 FCC Rcd 2126, 2127, 2577 (1988), *applications for review pending for other reasons* (carrier's complaint dismissed to extent barred by section 415(b) of Act).

[30] *See* n.16, *supra*.

[31] 47 U.S.C. § 203(c)(1) provides, in pertinent part, that no carrier shall:

> charge, demand, collect, or receive a greater . . . compensation, for [interstate and foreign wire or radio communication], or for any service in connection therewith, between the points named in any such schedule [of tariffed charges] than the charges specified in the schedule then in effect . . . .

[32] Alascom Brief at 14. As previously noted (note 16, above), the term "overcharges" means "charges for services in excess of those applicable thereto under the schedule of charges lawfully on file with the Commission". The division of interstate toll revenues compensation arrangements here involved were not contained in any "schedule of charges lawfully on file with the Commission".

[33] 47 U.S.C. § 415(e) provides as follows:

> [t]he cause of action in respect of the transmission of a message shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

[34] *See* n.15, *supra*.

[35] *See* 47 U.S.C. § 415(c) (providing relief from carrier overcharges through either an "action at law" or a "complaint filed with the Commission"; Tele-Valuation, Inc. v. AT&T, 73 FCC 2d 450, 453 (1979) (action for overcharges is commenced by filing an action at law, a complaint with the Commission, or a

claim with the carrier). *See also* 47 U.S.C. § 207 (providing for recovery of damages from a carrier through the mutually exclusive remedies of filing a complaint with the Commission pursuant to section 208 of the Act or bringing suit "in any district court of the United States of competent jurisdiction . . . [but not] both such remedies.") In view of the foregoing, we need not reach ATU's assertion that the term "charges" within the meaning of section 415(a) encompasses only lawfully tariffed charges filed pursuant to section 203(a) of the Act and, consequently, that its complaint is not concerned with the recovery of charges.

[36] *See* n.16, *supra*.

[37] Alascom Brief at 13.

[38] Section 3(h) of the Act, 47 U.S.C. § 153(h), provides, in pertinent part, that:

> "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . . .

Alascom clearly is involved in such communication and therefore is a "common carrier subject to this Act" within the meaning of section 208 of the Act. (*See* n.1, *supra*).

[39] *Armstrong*, *supra*, 25 FCC 2d at 390, (cause of action, if any, arose when telephone carrier refused to enter into agreement for lease of space on its poles) *citing* In Accrual of Cause of Action, 15 I.C.C. 201, 204 (1909).

[40] ATU's complaint is not based on its transmission of a message within the meaning of section 415(e) as Alascom contends but on Alascom's refusal to agree to alleged lawful settlements.

[41] Traffic Agreement at 9; Special Services Agreement at 5.

[42] Findings of Fact and Conclusions of Anchorage Telephone Utility, at 39.

[43] *See Midstate*, 320 U.S. at 357-58; ¶¶ 26-27, *infra*.

[44] As previously noted (para. 14, *supra*), we do not here reach the issue whether ATU has sustained its allegations that Alascom violated the Act. While the Commission clearly has authority under section 205 of the Act, 47 U.S.C. § 205, to determine and prescribe just and reasonable charges, classifications, regulations and practices in appropriate circumstances, not every dispute between carriers over settlements necessarily warrants the exercise of such authority. The United States Court of Appeals for the District of Columbia Circuit has stated that the Commission should not be forced to arbitrate contractual disputes between carriers over the division of revenues from their joint venture and that "[t]he purpose of the Act is to protect the public interest rather than to provide a forum for the settlement of private disputes." United Tel. Co. of Carolinas, Inc. v. FCC, 559 F.2d 720, 723 (1977). The court found that the Commission did not abuse its discretion in dismissing the carriers' petition for prescription of reasonable division of charges of their joint venture when they had not sufficiently challenged the reasonableness of the existing settlements.

[45] ATU asserts that breach of the parties' Agreements to agree on a rate of return must be deemed immaterial and cannot trigger the running of the statute of limitations. However, it is clear that such failures are at the heart of the parties' failure to agree on final settlements and certainly is a material, and apparently, the single most important factor in the parties' dispute. *See* para. 8, *supra*. ATU apparently argues that it had no judicially enforceable cause of action for breach of contract as the result of such failues to agree on a rate of return prior to the upcoming year. However, its cause of action, or the complaint it filed under section 208 of the Act, is not for breach of contract under contract law of the State of Alaska but rather for alleged violations of the Act because of Alascom's insistence on and use of, *inter alia*, what ATU viewed as a return that was too low.

[46] The relevant time periods with respect to MTS and private line service are January 1, 1980 to October 15, 1984, and January 1, 1980 to April 22, 1985, respectively. Thereafter, ATU's compensation for Alascom's use of its facilities was governed by ATU's interstate access tariff. *See* n.3, *supra*.

[47] *Armstrong*, *supra*, *Midstate*, *supra; see* Thornell Barnes Co. v. Illinois Bell, 1 FCC 2d 1247 (1967); Ward v. Northern Ohio Telephone Co., 251 F. Supp. 606, *aff'd*, 381 F.2d 16 (6th Cir.1967).

[48] 31 FCC 2d at 454. *See also* U.S. Cablevision Corp. v. New York Telephone Co., 46 FCC 2d 704, 707 (1974).

[49] *Id.* at 453-54. *See also* Thornell Barnes Co., *supra*, 1 FCC 2d at 1252.

[50] *See* Atchison, T. & S. F. Ry. Co. v. Blanchette, 628 F.2d 1011, 1015 at n.9 (1980), *citing* A.J. Phillips Co. v. Grand Trunk Washer R. Co., 236 U.S. 662 (1915).

[51] ATU was afforded an opportunity to further brief and supplement the record to support its contention that its claim was not extinguished by the passage of more than two months between the effective date of the court's dismissal of its counterclaim on October 23, 1986, and the filing of its section 208 complaint before the Commission on January 20, 1987. ATU chose not to avail itself of such opportunity. *See* Letter from Deputy Chief, Enforcement Division, Common Carrier Bureau, to Francis E. Fletcher, Jr. (Oct. 19, 1988).

[52] 47 U.S.C. § 207 provides as follows:

> Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

[53] *Bunker Ramo*, *supra*, 31 FCC 2d at 453.

[54] Dupree v. Jefferson, 666 F.2d 606, 611 (D.C. Cir. 1981); Wilson v. Gruman Ohio Corp., 815 F.2d 26, 27 (6th Cir. 1987), *citing* Boomer v. Ribicoff, 304 F.2d 427 (6th Cir.1962); 5 Moore's Fed. Practice ¶ 41.05[2]. *See also* Cook v. G.D. Searle & Co., 759 F.2d 800, 804-05 (10th Cir. 1985); Curtis v. United Transp. Union, 648 F.2d 492 (8th Cir. 1981); White v. Padgett, 475 F.2d 79, 83-84 (5th Cir. 1973).

[55] *Id.*

[56] ATU Brief at 24.

[57] *Armstrong*, *supra*, 25 FCC 2d at 390.

[58] ATU Brief at 40.

[59] Section 626(d) of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 626(d).

[60] Wilson v. Gruman Ohio Corp. *supra*, 815 F.2d at 28, *citing* Brown v. Mead Corp., 646 F.2d 1163, 1165 (6th Cir. 1981). *See also* Annotation, Tolling 3-Year Limitation Period of § 6 of the Federal Employers' Liability Act (45 U.S.C. § 56) -- Federal Cases, 13 L.ed 2d 1256, 1260-65.

[61] *See Armstrong*, *supra*, 25 FCC 2d at 389-90.

[62] *See, e.g., Midstate, supra;* Tele-Valuation, Inc. v. AT&T, 46 RR 2d 165, 168 (1979).

[63] ATU Brief at 41-42.

[64] Alascom Brief, Exhibit R at 10-11.

[65] *Id.* at 12.

[66] ATU Brief at 46.

[67] ATU Reply Brief at 53.

[68] Alascom Brief at 44.

[69] *See, e.g.,* Louisiana PSC v. FCC, 476 U.S. 355 (1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-124

In the Matter of

Access to Telecommunications Equipment
and Services by the Hearing Impaired
and Other Disabled Persons

ORDER

Adopted: March 8, 1989; Released: March 8, 1989

By the Chief, Common Carrier Bureau:

1. The National Center for Law and the Deaf, the Organization for Use of the Telephone and the Maryland's People Counsel (jointly, Petitioners) have filed a request for an extension of time of thirty days after publication of the *Further Notice of Proposed Rule Making* (FNPRM), CC Docket No. 87-124, FCC 89-55, released February 16, 1989, in the Federal Register in which to file comments. The FNPRM proposes rules which would require nearly all telephones manufactured in or imported into this country after August 16, 1989, to be hearing aid compatible. Comments and reply comments are currently due March 9, 1989 and March 20, 1989, respectively.

2. Petitioners state that adequate time has not been accorded interested parties to participate in this Rule Making proceeding, as required by the Administrative Procedure Act, 5 U.S.C. § 553(b). Although the Commission released the full text of the item on February 16, 1989, the summary of the FNPRM did not appear in the Federal Register until March 3, 1989. Petitioners feel that the subject matter cannot be adequately analyzed and fully addressed in the time currently allotted and that an extension of time is necessary.

3. It is the policy of this Commission that extensions of time shall not be routinely granted.[1] In that some interested parties may have received notice of this proceeding only by the Federal Register, and in the interest of obtaining the fullest record possible upon which to base our final determination, we believe the public interest would be served by granting additional time to permit interested parties to prepare their comments. In making this decision, we note Congress' mandate requiring the Commission to complete Rule Making actions to implement the amendments made by the Hearing Aid Compatibility Act of 1988 by May 16, 1989.[2] In balancing these considerations, we will grant an extension of one week for parties to prepare comments. We believe this additional time will be sufficient to permit parties to submit their views, yet allow the Commission the time needed to comply with its implementation deadline.

4. Accordingly, IT IS ORDERED, that the request for an extension of time filed by the National Center for Law and the Deaf, the Organization for Use of the Telephone and the Maryland's People Counsel IS GRANTED IN PART AND DENIED IN PART as specified herein. Comments are due on or before March 16, 1989 and reply comments are due on or before March 27, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Bureau Chief (Operations)
Common Carrier Bureau

FOOTNOTES

[1] *See* 47 C.F.R. § 1.46(a).

[2] Hearing Aid Compatibility Act of 1988, Public Law 100-394.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-79

In the Matter of

Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies

ORDER

Adopted: March 3, 1989; Released: March 20, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On September 12, 1988, Southwestern Bell (SWB) filed a motion to amend its compliance plan for the integrated provision of customer premises equipment (CPE) and basic services. SWB seeks permission to modify the procedures it described in its plan for generating installation reports. For the reasons discussed below, we grant this motion.

II. BACKGROUND

2. The *BOC CPE Order* [1] relieved the Bell Operating Companies (BOCs) of the structural separation requirements governing their provision of CPE and replaced those requirements with nonstructural safeguards. The Commission required the BOCs to submit plans describing how they would comply with these safeguards and delegated authority to the Chief of the Common Carrier Bureau (the "Bureau") to review these plans. One of the safeguards adopted in the *BOC CPE Order* is a requirement that the BOCs file quarterly nondiscrimination reports comparing the timeliness of network service installation work performed for customers with BOC-provided CPE versus other customers.[2] The Commission required the BOCs to describe in their compliance plans the procedures they would use to generate their installation reports, as well as the extent to which they would disaggregate the data in these reports.

3. In its compliance plan, filed April 13, 1987, SWB proposed to use a survey mechanism to compile data for its installation reports. Specifically, SWB stated that each month it would provide a census of orders associated with its own CPE and a sampling of all other network service orders to an outside survey firm. SWB stated that it would also provide the survey firm with information concerning SWB's success in meeting the assigned installation dates for each order.[3] The survey firm would then contact small and medium business customers monthly to inquire about their satisfaction with SWB's installation service, while it would contact large business customers annually (half of such customers each six months) by mail. SWB proposed to file quarterly reports for its small and medium size business customers, and annual reports for its large business customers. It stated that its reports would include both the survey results and data concerning the company's success in meeting the assigned due date. It initially proposed to disaggregate its data into four service categories; however, after the formal closing of the record, it filed an *ex parte* letter proposing additional disaggregation of its reports into three categories of switched services -- (1) local exchange; (2) analog switched special (circuits that are dedicated from a customer's premises to the central office but terminate in a switch in the central office, such as WATS/800 circuits); and (3) switched digital service -- and three categories of private line services -- (1) 56 Kbps; (2) subrate DDS; and (3) T-1 service.[4]

4. The *BOC CPE Plans Order* [5] approved SWB's nondiscrimination plan, but required SWB to amend its plan to provide for quarterly installation reports for all of its business customers, both large and small. SWB subsequently filed this required amendment.

III. POSITIONS OF THE PARTIES

5. In its petition, SWB seeks permission to modify its procedures for generating installation reports by eliminating its customer survey and limiting its reports to data on the total number of completed orders and the number of missed due dates in each service category. SWB would generate these reports by relying on a modified version of the procedures it currently uses to compile its Centralized Operations Group (COG) reports. Specifically, SWB would mark service orders placed by SWB CPE personnel or by SWB network services personnel that indicate that the customer has purchased CPE from SWB. SWB would assume, for purposes of its reports, that unmarked network service orders are associated with customers that have not purchased SWB CPE.[6] SWB would then match this information against data stored in its service order processing systems on due date performance. SWB states that once the installation order has been completed and accounted for in SWB's tracking system, it would delete the code from its service order record.[7] SWB does not propose to alter the service categories included in its reports.

6. SWB argues that its proposed tracking system would be more cost effective and accurate than the survey mechanism. It states that an effective survey would require approximately 200,000 customer contacts on an annual basis, at a cost of approximately $400,000. In contrast, it states, it could generate reports under its proposed tracking system at "negligible" cost.[8] It also claims that it could provide more accurate data with this tracking system since it could report on all service order activity, not just a sampling of orders chosen for survey.[9] In addition, SWB argues that its proposal mirrors other BOC proposals, such as those of PacTel, US West, Ameritech, and BellSouth, that we approved in the *BOC CPE Plans Order*.[10]

7. No party filed comments on SWB's petition.

IV. DISCUSSION

8. We grant SWB's petition and permit it to alter its procedures for generating CPE installation reports as it proposes. SWB makes a strong argument that its procedures should provide data at least as accurate as the data that would be generated through the survey mechanism of its current compliance plan. Indeed, we have already approved for other BOCs procedures substantially similar to those that SWB now proposes. Moreover, SWB has shown that the procedures of its current plan would be more cumbersome and costly to implement than the procedures it now proposes.[11]

V. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED, that, pursuant to Sections 4(i), 4(j), 201-205, 218, 220, 403, and 404 of the Communications Act, 47 U.S.C. §§ 4(i), 4(j), 201-205, 218, 220, 403, and 404, Sections 0.91(h) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91(h) and 0.291, and the *BOC CPE Order*, 2 FCC Rcd 143 (1987), SWB's motion to further amend its CPE compliance plan is granted.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, 2 FCC Rcd 143 (1987), *modified on reconsideration*, 3 FCC Rcd 22 (1988).

[2] The *BOC CPE Order* initially required the BOCs also to compare maintenance intervals provided to their own CPE customers and other customers. However, on reconsideration, the Commission modified this requirement to permit the BOCs instead to submit annually an affidavit, signed by the BOC officer who is responsible for maintenance operations, attesting that the company has followed the maintenance procedures described in its compliance plan and that it has not, in fact, discriminated in the provision of network maintenance on the basis of a customer's CPE vendor. *See* 3 FCC Rcd at 26, para. 29-31.

[3] SWB stated that it would compile this information by placing a code in the Southwestern Order Retrieval and Distribution System to identify service orders placed by customers with SWB CPE. SWB Compliance Plan at 23.

[4] *See* Letter from Karen S. Rogers, Director - Federal Regulatory, SWB, to William Tricarico, Secretary, FCC, Oct. 30, 1987.

[5] Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, 3 FCC Rcd 412 (1988).

[6] *See ex parte* letter from Martin E. Grambow, Executive Director - Federal Regulatory, SWB, to Donna Searcy, Secretary, FCC, January 25, 1989.

[7] *Id.*

[8] SWB Motion at 5.

[9] *Id.* at 3.

[10] *Id.* at 4.

[11] In addition, we note that no party opposes SWB's proposed amendment to its CPE compliance plan.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LOW COUNTRY CARRIERS, INC. d/b/a HARGRAY LONG DISTANCE COMPANY — File No. I-T-C-89-043

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 13, 1989; Released: March 21, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on January 9, 1989 by Low Country Carriers, Inc., d/b/a Hargray Long Distance Company (LCCI) requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on January 18, 1989. No comments were received.

2. The applicant is already providing domestic resale services. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by LCCI.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-043 IS GRANTED, and LCCI is authorized to provide international switched voice services by the resale of the international switched voice services set forth in US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the United States and those points listed in the tariff.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1987).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc. 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GRAPHNET, INCORPORATED — File No. I-T-C-89-040

Application for authority to acquire and operate facilities for service to Poland.

ORDER AUTHORIZATION AND CERTIFICATE

Adopted: March 13, 1989; Released: March 21, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on January 10, 1989 by Graphnet, Incorporated, requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for direct service between the U.S. and Poland and beyond. The application was placed on public notice on January 18, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Poland by Graphnet.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-040 IS GRANTED, and Graphnet is authorized to:

a. lease from Comsat and operate one voice-grade satellite circuit between an appropriate earth station on the east coast of North America and an satellite over the Atlantic Ocean, connecting with a similar circuit between the satellite and an earth station in Poland furnished by Graphnet's correspondent in Poland;

b. multiplex the circuit to provide up to 24 telex and/or telegraph channels;

c. lease from AT&T and operate one voice-grade circuit in the east coast earth station;

d. lease and operate necessary domestic connecting facilities; and

e. use said facilities to provide Graphnet's regularly authorized services between the U.S. and Poland and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between Graphnet and its correspondent in Poland, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This authorization shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. IT IS FURTHER ORDERED that Graphnet shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1987).

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-567

In the Matter of

Amendment of Part 90 of the Commission's Rules to Implement a Conditional Authorization Procedure for Proposed Private Land Mobile Radio Service Stations	RM 6277

ORDER

Adopted: March 13, 1989; Released: March 21, 1989

By the Chief, Private Radio Bureau:

1. On January 9, 1989, the Commission released a *Notice of Proposed Rule Making* (*Notice*), 54 FR 1733 (January 17, 1989) in the above captioned proceeding. This proceeding concerns a proposal to amend Section 90.159 of the Commission's Rules, 47 C.F.R. § 90.159, to allow applicants for new stations operating below 800 MHz to commence operations under a temporary permit upon completion of the frequency coordination process and submission of their applications to the Commission. Comments were due on February 27, 1989 and reply comments are due on March 14, 1989.

2. On March 8, 1989, Teletech, Inc. (Teletech), requested a 30 day extension of the reply comment deadline. In support of its request, Teletech cites the volume of comments filed in this proceeding as well as the time required for obtaining copies of the comments through the Commission's duplicating contractor, analyzing the comments and preparing a thoughtful and relevant reply.

3. Teletech has provided adequate justification for an extension of the reply comment period. A reasonable extension is in the public interest because it will provide adequate time for all who wish to reply to review the comments and prepare useful responses that would add to the record in this proceeding.

4. Accordingly, IT IS ORDERED, That the Motion for Extension of Time filed on March 8, 1989, by Teletech, Inc., is GRANTED and the deadline for filing replies in this proceeding is extended until **March 31, 1989.**

5. This action is taken pursuant to delegated authority under Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-112

In the Matter of

Amendment of Part 74 of the
Commission's Rules to Provide for
Satellite and Terrestrial Microwave
Feeds to Noncommercial Educational
FM Translators

ORDER REQUESTING COMMENTS

Adopted: March 10, 1989; Released: March 13, 1989

By the Chief, Mass Media Bureau:

1. On March 1, 1989, a "Joint Proposal for Noncommercial Educational FM Translators" (Joint Proposal) was filed in the above-captioned docket. The Joint Proposal was filed by several parties which filed Petitions for Reconsideration in this docket: Moody Bible Institute of Chicago; National Public Radio; National Federation of Community Broadcasters; Intercollegiate Broadcasting Systems, Inc.; and Family Stations. The parties state that this Joint Proposal is submitted to help resolve the issues raised in this proceeding and request that we seek public comment on their proposal.

2. In support of their Joint Proposal, the parties state that it allows for use of alternative signal delivery to noncommercial educational FM translators which are owned and operated by the licensee of the primary station to be rebroadcast and which comply with a series of conditions that are designed to assure continued interference-free radio service in the noncommercial educational FM band and to allow expansion of service through the use of FM translators.

3. The Joint Proposal proposes to amend the modifications of Part 74 of the Commission's rules regarding alternative signal delivery for noncommercial educational FM translators that were adopted in the *Report and Order* (3 FCC Rcd 2196 (1988)) in this proceeding. These proposed amendments relate to: 1) interference protection criteria for new translator facilities: 2) a transition period during which an applicant must show a second available noncommercial frequency unless the applicant meets certain specific conditions; and 3) specific technical guidance for showing a second available frequency. The parties also request that the Commission not extend alternative signal delivery eligibility to third party owned translators as proposed in the *Further Notice of Proposed Rule Making* (3 FCC Rcd 2202 (1988)) in this proceeding during the transition period. In light of the important issues raised in this Joint Proposal, we believe that good cause exists for granting the parties' request that we seek public comment. A copy of the transmittal letter and the full text of the Joint Proposal is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, Northwest, Washington, D.C.

4. Accordingly, IT IS ORDERED, that the date for filing comments on this Joint Proposal submitted in MM Docket No. 86-112 is **April 3, 1989.** Reply comments must be filed by **April 13, 1989.**

5. This action is taken pursuant to authority found in Section 4(i) and 303 of the Communications Act of 1934, as amended, and Section 0.283 of the Commission's Rules.

6. For further information contact Tatsu Kondo, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-75

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION

Request for Waiver of Freeze on Applications to Provide Aeronautical Satellite Services via INMARSAT

For a Waiver Pursuant to Section 319(d) of the Communications Act of 1934, as amended, to make modifications to coast earth stations to provide Aeronautical Satellite Services via INMARSAT

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 1989; Released: March 14, 1989

By the Commission:

1. Communications Satellite Corporation (Comsat) has requested the Commission to: (1) grant a waiver of the present freeze on aeronautical satellite applications so that the Commission may accept for filing Comsat's applications to provide aeronautical satellite services via the INMARSAT system and to procure and construct facilities for the provision of such services; and (2) grant a waiver pursuant to Section 319(d) of the Communications Act of 1934, as amended, 47 U.S.C. §319 (1976), to commence immediately modifications that must be made to its Santa Paula, California, and Southbury, Connecticut, coast earth stations in order to provide aeronautical services via INMARSAT. Comsat has indicated that it proposes to provide aeronautical satellite services via INMARSAT to aircraft in international flight.[1] Aeronautical Radio, Inc. (ARINC) filed comments opposing Comsat's request to waive the freeze on filing aeronautical applications but supporting Comsat's request for a waiver to begin making modifications to its coast earth stations.

2. We established the freeze on acceptance of applications to provide aeronautical services via INMARSAT when we initiated Docket No. 87-75 in 1987.[2] In this proceeding, we are considering the institutional, operational and policy questions about how INMARSAT aeronautical services will be provided in the United States. The proceeding was initiated after we had denied applications of Comsat to provide INMARSAT aeronautical services as unlawful under the International Maritime Satellite Telecommunications Act, 47 U.S.C. 751 (1978).[3] In the Notice of Proposed Rule Making initiating Docket No. 87-75, we stated that " . . . while this proceeding is pending, we will not accept for filing any applications to provide aeronautical services via INMARSAT in view of the unresolved issues regarding the provision of these services."[4] A final decision in Docket No. 87-75 remains pending Commission consideration of supplemental petitions and comments recently filed in the proceeding.

3. In support of its requests, Comsat states that the Commission must waive its freeze on filing applications in order to permit Comsat to move forward promptly to compete with foreign consortia now actively marketing INMARSAT aeronautical service to U.S. users. Comsat believes that the U.S. will not be able to enter this market for years or decades to come unless it is permitted to move forward now with its services. Comsat further states that the record in Docket No. 87-75 demonstrates overwhelming support for immediate authorization of Comsat to participate in INMARSAT's aeronautical activities and that such authorization can be accomplished expeditiously only if the freeze is waived to permit Comsat's applications to be processed and granted. As to its request for a Section 319(d) waiver, Comsat states that it must begin immediately to install equipment to inaugurate service in a timely fashion. Comsat seeks to offer a slow speed cockpit data services as early as the summer of 1989 as an interim service while equipment for its proposed full service is being developed and readied for operation.[5] Comsat contends that its proposed services would be further delayed if it has to await final Commission action on its applications before commencing construction. Comsat estimates that the total costs of modifying its coast earth stations to be $10 million, of which about $5 million must be committed at once in pre-construction procurement activities if Comsat is to provide service on a timely basis. It understands that any construction undertaken pursuant to a waiver will be at its own risk and subject to previous Commission direction in accounting for aeronautical expenses. Additionally, Comsat understands that favorable Commission action here will not prejudice final Commission action regarding authorization to provide aeronautical services.

4. ARINC supports grant of a Section 319(d) waiver to allow Comsat to establish the earth station facilities that will be used to provide INMARSAT aeronautical services. ARINC states that, even though the issue of which entities will be allowed to access INMARSAT aeronautical space segment and how such access is to be achieved remains to be resolved in CC Docket No. 87-75, there is no question that Comsat would be one of those entities. It further states that the existence of U.S.-based facilities ready to operate once the service provision issues are resolved will enable U.S. service providers to remain competitive with foreign providers currently marketing services in the United States and abroad. ARINC therefore supports permitting Comsat to begin procurement and installation of equipment as long as it does not prejudge Commission action on issues in CC Docket No. 87-75 and is subject to certain other conditions.[6]

5. ARINC, however, does not support Comsat's request for a waiver of the freeze on acceptance of applications to provide INMARSAT aeronautical services. ARINC contends that the Commission should defer from processing any Comsat applications until after expeditious resolution of the issues in CC Docket No. 87-75. It argues that proceeding down parallel paths would lead to unnecessarily wasteful duplication of effort by interested parties and the Commission, and raises the possibility of conflicting results if the competitive access proposals in CC Docket No. 87-75 are adopted while Comsat's application is being

processed. ARINC urges the Commission to focus on expeditiously formulating a comprehensive policy based on its comments in CC Docket No. 87-75. It believes that granting Comsat's request for a Section 319(d) waiver to begin procurement and construction obviates any claim by Comsat that it will be held back from participating in INMARSAT's aeronautical satellite program if its applications are not immediately accepted for filing.

6. In reply, Comsat contends that the parallel processing of Comsat's applications during the pendency of CC Docket No. 87-75 would put the Commission in a position to act on the applications when it resolves the Rule Making. Comsat believes that deferring the processing of its applications would leave a regulatory cloud over its entry into the market, seriously hamper its market credibility and delay the initiation of service. Further, Comsat asserts that the Commission should not allow the resolution of the competitive access issues in CC Docket No. 87-75 to delay its entry into the market. Rather, it agrees with an approach suggested by NTIA in the proceeding that the Commission limit its decision to the issue of authorizing Comsat's entry into the market and resolve the treatment of future applicants at a later date.

DISCUSSION

7. We will grant both of Comsat's requests. We express no view here on whether Comsat ultimately will be permitted to provide INMARSAT aeronautical services, and do not intend in any way to prejudge the issues before us in this Rule Making proceeding. Moreover, we do not intend in any way to encourage Comsat to take the limited actions it proposes herein. Nevertheless, we see no harm in permitting Comsat to take limited steps at its own risk, subject to the conditions set forth below. In granting Comsat's Section 319(d) waiver, we emphasize that Comsat is acting at its own risk and that it must exclude all payments for earth station modifications from its rate base unless the Commission grants its applications to make its proposed modifications. In addition, it must continue to isolate the capital and expense costs of the aeronautical portion of its INMARSAT activities and to separate its aeronautical accounts from other accounts used to compute rates for maritime users. Furthermore, our action here is in no way intended to prejudice the outcome of the issues in CC Docket No. 87-75 and other proceedings, or foreclose us from imposing any conditions on any possible Comsat authorization to provide aeronautical services that may be necessary as a result of our ultimate decision in CC Docket No. 87-75 or other proceedings.[7] As with our action in permitting Comsat to begin installation of equipment at its own risk, accepting its applications for filing at this time is without prejudice to the outcome of pending policy issues in this proceeding. A waiver of the freeze will permit Comsat's applications to be accepted for filing and placed on public notice and give an opportunity for petitions to deny and competing applications to be filed by others who believe they may ultimately be authorized to provide INMARSAT aeronautical services. Such applications will not, however, be granted until it is determined who is legally authorized to provide INMARSAT aeronautical services under the International Maritime Satellite Telecommunications Act, and under what circumstances such services may be provided.[8]

8. Accordingly, IT IS ORDERED that Comsat's request for a Section 319(d) waiver to modify its coast earth stations at Santa Paula, California, and Southbury, Connecticut IS GRANTED, and Comsat may at its own risk procure and install, but not operate, necessary GES equipment at those facilities.

9. IT IS FURTHER ORDERED that grant of a Section 319(d) waiver is without prejudice to ultimate Commission action in CC Docket No. 87-75 and on applications that may be filed by Comsat or others to provide international aeronautical mobile satellite services via INMARSAT consistent with the Commission's decision in CC Docket No. 87-75 and other proceedings.

10. IT IS FURTHER ORDERED that Comsat shall exclude all payments for earth station modifications from its rate base, and shall continue to isolate the capital and expense costs of the aeronautical portion of its INMARSAT activities and to separate its aeronautical accounts from other accounts used to compute rates to maritime users.[9]

11. IT IS FURTHER ORDERED that Comsat's request for a waiver of the present freeze on applications to provide international aeronautical mobile satellite services via INMARSAT IS GRANTED and the Common Carrier Bureau may accept for filing, but not grant, Section 214 applications by Comsat or others to provide INMARSAT aeronautical services and its Title III applications to modify or construct coast earth stations to permit the provision of such services.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See* letter from Vice President, Communications Satellite Corporation to the Commission, dated November 29, 1988.

[2] Provision of Aeronautical Services via the INMARSAT System, CC Docket No. 87-75, 2 FCC Rcd 1976 (1987).

[3] Communications Satellite Corporation, File Nos. CSS-005-M(2) and I-T-C-86-181, 2 FCC Rcd 390 (1987).

[4] Provision of Aeronautical Services via the INMARSAT System, at 1976.

[5] Comsat specifies the use of the following frequency bands; 6417.5-6425.0 MHz; 4192.0-4200.5 MHz; 6425-5443 MHz and 3600-3623 MHz. Its proposed full service offering would include, by year end 1990, cockpit data and cockpit voice demand assigned services to support airline operational and air traffic communications. Also, Comsat's proposed full service offering would include air passenger telephone service.

[6] ARINC requests the Commission to state explicitly that Comsat must exclude all payments for the earth station modifications from its rate base; that the modifications are undertaken at Comsat's own risk and volition, and remain subject to future Commission determinations; that Comsat isolate all capital and expense costs for the earth station modifications from its jurisdictional accounts; and that Comsat's establishment of aeronautical coast earth station facilities will in no way influence the outcome of CC Docket No. 87-75.

[7] For example, the Commission has determined that it will grant a license for a domestic Mobile Satellite Service that will use the frequency bands 1545-1548 and 1646-1649 MHz. *See* Second Report and Order, Gen. Docket No. 84-1234, 2 FCC Rcd 485 (1986).

[8] We stated in our *January 12th Order* that we cannot authorize United States participation in INMARSAT aeronautical services unless and until the United States formally accepts the aeronautical amendments to the INMARSAT Convention and Operating Agreement and those amendments enter into force. These amendments were accepted by the United States in April 1988 but have not yet entered into force. Notwithstanding that statement, we find that it is now in the public interest to accept these applications for filing for the reasons stated in this order, *i.e.*, that no harm or prejudice will result as a result of the filing of these applications.

[9] *See* Communications Satellite Corporation, 2 FCC Rcd at 395; *See* also letter to Vice President and General Manager, Comsat, from Chief, Common Carrier Bureau, dated August 16, 1986, and letter to Chief, Common Carrier Bureau from Comsat, dated August 27, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 87-5

In the Matter of

Amendment of §§ 22.501(g)(2) and 94.65(a)(1) of the Rules and Regulations to Re-Channel the 900 MHz Multiple Address Frequencies	RM-5206
Amendment of § 94.65(a)(1) of the Rules to Revise Footnote 3 in the Frequency Table to Make the Frequencies Available for use by any Part 94 Eligible	RM-5362
Amendment of Part 2 and §§ 94.63(d)(5) and 94.65(a)(1) Footnote 3 of the Rules to Permit Operation of Mobile Remote Meter Reading Systems on a Primary Basis on the Exclusive Power Radio Service Frequencies in the 952.3625 - 952.8375 MHz Band	RM-5178
Amendment of Part 94 of the Rules to Permit Intrasystem Communications Among Multiple Address System Master Stations	RM-5383

MEMORANDUM OPINION AND ORDER

Adopted: March 1, 1989; Released: March 22, 1989

By the Commission: Commissioner Quello concurring and issuing a statement.

I. INTRODUCTION

1. On March 14, 1988, we released a *Report and Order* concluding our comprehensive review of the rules and policies governing the operation of 900 MHz multiple address systems (MAS).[1] Five parties have filed limited petitions for reconsideration. Digital Radio Networks, Inc. (Digital), Radscan, Inc. (Radscan), the American Petroleum Institute (API), and the Utilities Telecommunications Council (UTC) request that the Commission reconsider the newly adopted 75-mile co-channel fixed mileage separation standard between master stations of multiple address systems.[2] Granger Associates (Granger), UTC, and API ask that we reconsider our clarification of the Commission's Rules to define better a multiple address system.[3] In addition, UTC urges the Commission to clarify that the geographic relocation of a station within an existing MAS service area following a channel split should, pursuant to the revised rules, be considered a "minor" rather than a "major" modification.[4]

2. Microwave Data Systems (MDS) and Motorola, Inc. (Motorola) filed Oppositions limited to Digital's and Radscan's requests for reconsideration of the 75-mile fixed co-channel separation standard.[5] Both dispute Digital's and Radscan's criticism of the technical assumptions upon which we based our decision to modify the mileage separation criterion. EnScan, Inc. (EnScan) filed an Opposition to the petitions filed by Digital, Radscan, and API but not to those filed by Granger or UTC.[6] NITECH, Inc. (Nitech) filed a Motion for Leave to File together with a limited Opposition in which it opposed API's suggestion that the mobile separation standards should also be reconsidered.[7] Digital filed a Reply in which it disputes MDS's and Motorola's technical analyses and reiterates its own.[8]

II. BACKGROUND

3. In Docket 87-5, we undertook a comprehensive review of the rules and policies governing 900 MHz MAS operations.[9] We initiated this proceeding in response to four petitions for rule making[10] and our experience in licensing MAS operations, which revealed that the service was evolving differently than originally envisioned.[11] In our *Report and Order* we revised several rules governing MAS operations. Specifically, we (1) reduced the co-channel separation standard between fixed master stations from 70 miles between services areas[12] to 75 miles between master stations;[13] (2) adopted fixed mileage separation standards for mobile-to-fixed and mobile-to-mobile operations;[14] (3) reduced the standard channel spacing from 25 kHz to 12.5 kHz;[15] and (4) permitted primary licensing of mobile meter reading services.[16]

4. In their petitions for reconsideration, Digital, Radscan, API, and UTC challenge the adoption of the 75-mile co-channel separation standard.[17] They do not dispute the adoption of a fixed mileage separation standard *per se;* rather, they challenge the choice of 75 miles as inadequate to afford sufficient interference protection between co-channel MAS systems.[18] In addition, Digital and API allege that the procedure by which the Commission revised the separation standard did not comply with the notice and comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553.[19] The petitioners allege similar procedural deficiencies regarding our interpretation of the definition of an MAS system.[20]

5. In the *Order* granting partial stay pending reconsideration in this proceeding, we concluded that petitioners' contention that implementation of the new separation criteria would result in harmful interference to existing licensees warranted further study.[21] We have carefully reviewed the record developed herein and conclude that modifications of the separation criteria are warranted, as discussed *infra*. We have also reviewed the revised definition of multiple address system, in light of the concerns expressed by the petitioners, and are amending the definition to clarify that MAS frequencies are to be used for point-to-multipoint communications. Finally, we clarify the licensing procedure for relocating an existing station following a split of the channel.[22]

III. DISCUSSION

A. Standard Co - channel Mileage Separation

6. In the *Report and Order* in the instant proceeding, we adopted a co-channel mileage separation standard between fixed MAS master stations of 75 miles.[23] This mileage separation standard was based on providing a 20 dB carrier-to-interference (C/I) ratio[24] at the edge of the service area[25] for at least fifty percent of the locations, 90 percent of the time. We used the Commission's R-6602 curves[26] for the propagation model, assumed a worst case location for the remote station,[27] and assumed that the interfering station was operating at maximum power with an antenna height above average terrain (HAAT) of 500 feet.

7. Four petitioners, Digital, API, UTC, and Radscan, have requested reconsideration of the decision to establish this 75-mile co-channel separation standard. They contend that a greater co-channel mileage separation is needed to assure adequate interference protection.[28] Digital argues that the 75-mile separation standard (1) "is not consistent with existing Commission policies or standard technical procedures," (2) "is based upon technical standards and quality of service assumptions that are a severe departure from those employed in the past for MAS," and (3) "will result in a degradation of system quality and reliability that is anathema to the continued development of the service"[29] (i.e., does not provide for a reliability of 99.9 percent or better throughout the service area). Radscan, UTC, and API advance similar arguments. UTC and Radscan reiterate Digital's argument that the original criteria adopted in 1981 for MAS operations incorporated a 99.9 percent service standard and that the new standard no longer provides this degree of protection.[30] They contend that we should ensure interference-free service at least 99.9 percent of the time.[31] Radscan, UTC, and API also maintain that the new standard will result in substantial degradation of MAS quality and reliability.[32] They maintain that a distance of at least 110 miles between master stations is needed.[33] Motorola and MDS filed comments opposing petitioners' requests that the 75-mile separation standard be increased. Both Motorola and MDS contend that Digital's engineering analysis is flawed.[34] Digital filed the only reply, in which it disputed Motorola's and MDS's technical conclusions and reiterated its own.

8. In response to these concerns, we have reexamined the predicted degradation at the typical 25-mile service boundary of MAS systems. We have applied a different, more conservative, propagation model as suggested by several petitioners, and a service probability of 95%.[35] We are sensitive to the concerns raised in the comments and seek to establish a judicious balance between spectrum availability and quality of service. Based on our current analysis, we conclude that a 90-mile station-to-station separation is more appropriate than the 75-mile separation adopted in the *Report and Order*. A result of the 90-mile separation will be a 10 dB degradation in signal quality from that provided by a 120-mile separation between typical MAS systems. Such degradation appears acceptable, especially when it can be overcome by using better engineering techniques or equipment, such as directional antennas at certain remote sites.[36] The new separation has been derived using the stated assumptions and to balance competing Commission objectives. We seek to ensure that the MAS service, in general, and licensees, in particular, can reasonably maintain the level of service quality developed over the years and currently provided. We believe licensees who may be affected by this reduced protection criteria will have reasonable alternatives to maintain their existing service quality. Meanwhile, such a reduction will enable increased use of this limited spectrum to satisfy the growing demand for MAS service. Accordingly, we are revising our rules to establish a 90-mile separation standard between co-channel, fixed MAS master stations.

9. In addition to the separation standard for fixed stations, we also established mileage separation standards for fixed-to-mobile and mobile-to-mobile operations in Docket 87-5.[37] API was the only entity to ask the Commission to reconsider the mobile separation standards. It argues that the separation should be 110 miles regardless of whether fixed or mobile stations are involved.[38] EnScan, Nitech, and Niagara Mohawk Power Corporation filed comments opposing API's recommendation to adopt a uniform standard. They argue that the interference potential from a mobile station is much less than that from a fixed station because of the differing system configurations and technical parameters; therefore, the separation should be less.[39]

10. We agree that the operation of mobile stations in this service introduces less potential for interference than does operation of fixed stations, and we will keep the mileage separation between mobile systems at 50 miles. As discussed above, however, we have increased our mileage separation standard between fixed stations to 90 miles. A 90-mile separation implies an operating radius for each associated master station not in excess of 45 miles. Following a similar reasoning for mobile systems separated by 50 miles, we arrive at a mobile radius of operation of 25 miles. We are, therefore, slightly increasing the mileage separation between fixed and mobile stations from 65 miles adopted in the *Report and Order* to 70 miles - the sum of the fixed and mobile service radii of 45 miles and 25 miles, respectively.

11. A number of the petitioners also contend that our adoption of a 75-mile separation standard was procedurally defective. Digital, for example, argues that the 75-mile separation standard deviates "too sharply" from our original proposal of 110 miles between master stations and, therefore, is invalid due to lack of notice and opportunity to comment.[40] API proffers a slight variation of the same argument, asserting that the separation criteria adopted in the *Report and Order* were beyond the scope of the *Notice of Proposed Rule Making*.[41]

12. Our action here largely moots the petitioners' procedural arguments in that we are revising the required master station co-channel mileage separation to more closely approximate our original proposal. We note, however, that our adoption of a 75 mile standard was not procedurally defective. An administrative agency may adopt a final rule that differs from its initial proposal where, as here, the final rule is a logical outgrowth of the proposed rule.[42] The APA notice and comment procedures would be meaningless if an agency could not take comments into account in formulating final rules.[43] Moreover, the fact that a final rule differs from the initial proposal does not entitle the parties to a new round of comments under the APA.[44]

13. We sought comments in our "comprehensive review" of the MAS regulations in Docket 87-5 on all parameters underlying the proposed 110 mile separation standard as well as the standard itself.[45] In response, both Motorola and MDS suggested that we could adopt a

75-mile standard for master stations if we assumed the use of directional antenna at the remote stations.[46] Many interested parties, including those seeking reconsideration, commented upon the 75-mile separation distance proposed by Motorola and MDS.[47] Thus, the final separation criteria adopted in the *Report and Order* were a "logical outgrowth" of the comments to our proposal in the *Notice*.[48]

B. Scattering of Remote Stations

14. In the *Report and Order*, we stated that our licensing experience indicated that applicants were requesting MAS frequencies for operations that could be implemented using point-to-point spectrum.[49] Accordingly, we revised the definition of a multiple address system to articulate our existing policy that MAS frequencies be used to satisfy point-to-multipoint needs, not communication requirements that can be satisfied by point-to-point frequencies. Specifically, we revised Section 94.3 to require that MAS remote stations would have to be scattered over the service area in such a way that more than two separate point-to-point systems would be needed to serve those remotes.[50] If that test were not met, the applicant should apply for point-to-point facilities. Granger and UTC argue that they were denied notice and an opportunity to comment upon our revision of the definition of a multiple address system in Section 94.3 of our Rules, 47 C.F.R. § 94.3.[51]

15. The requirement that MAS remote stations be scattered throughout the system's service area is an integral aspect of an MAS system.[52] Our purpose in revising the definition of multiple address was part of our overall effort in Docket No. 87-5 to accommodate the increasing demand for 900 MHz point-to-multipoint spectrum. Prohibiting point-to-point operations on MAS frequencies fosters our objectives for management of MAS spectrum, since there are many frequencies available for point-to-point operation and only a limited number available for multipoint use. In addition, the use of omnidirectional antennas in the MAS service to provide essentially point-to-point communications is spectrally inefficient.[53]

16. After considering the petitioners' arguments, and reassessing the development of our policies regarding intended use of MAS frequencies, we find that some additional refinement of the scattering requirement is warranted. As a result, we now conclude that limiting MAS frequency eligibility to systems as defined in the *Report and Order* may unduly restrict the uses of the MAS frequencies and hinder the development of MAS systems designed to satisfy unique or specialized communication requirements. A primary objective in this proceeding was to make our rules more flexible so that new technologies and different system designs can be licensed to provide valuable services to the public.[54] We therefore clarify the definition to make explicit our original intention in adopting the definition that the remote stations must be scattered over the service area in such a way that "two or more" point-to-point systems would be needed to serve those remotes.[55] Thus, on MAS frequencies, we will prohibit only those communications operations that could be accomplished on a single point-to-point system. We find that this approach will assure that MAS frequencies are used to provide multipoint communications services, thereby assuring efficient use of these limited frequencies, while at the same time allowing licensing flexibility to accommodate new technologies and unique systems.[56]

C. Channel Splitting

17. The final issue presented on reconsideration concerns the definition of a major change as related to splitting and relocation of channels. In the *Report and Order* we adopted 12.5 kHz as the standard bandwidth for MAS frequencies[57] and encouraged licensees to split existing 25 kHz MAS channels into two 12.5 kHz channels.[58] To promote spectrum efficiency, we stated that splitting an existing 25 kHz channel to create two separate 12.5 kHz channels will be considered a minor license modification[59] under Section 1.962 of the Rules, 47 C.F.R. § 1.962. UTC urges us to classify the relocation of an MAS station within an existing MAS service area, pursuant to the newly reduced channel bandwidth, as a minor modification. We specifically stated in the *Report and Order* that applications to split channels in a manner that would result in a major modification of the license would be handled pursuant to routine processing procedures.[60] Hence, if the applicant proposes to move the station as part of the splitting of the channel, this will result in a major modification of the underlying license if the move is greater than 5 seconds.[61] To revise the rules as suggested by UTC would raise important issues that would require another comment cycle. Therefore, UTC's request is denied.

IV. ORDERING CLAUSES

18. Accordingly, pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, IT IS ORDERED the Petitions for Reconsideration in PR Docket 87-5 are GRANTED to the extent indicated herein and DENIED in all other respects.

19. IT IS FURTHER ORDERED that master station co-channel separation criteria set forth in Section 94.63 of our Rules, 47 C.F.R. § 94.63, are amended as set forth in the Appendix below.

20. IT IS FURTHER ORDERED that the definition of 'multiple address' set forth in Section 94.3 of our Rules, 47 C.F.R. § 94.3, shall be amended as set forth in the Appendix below.

21. IT IS FURTHER ORDERED that the revised separation criteria and the attendant licensing procedures shall become effective **May 8, 1989** *see* § 1.427, 47 C.F.R. § 1.427 (Effective date of rules). This will allow time for notice by publication of a summary of this Memorandum Opinion and Order in the Federal Register. Applications will be processed under the rules in effect at the time they are filed.

22. IT IS FURTHER ORDERED that the partial stay of the revised rules regarding the aforementioned separation criteria, granted by separate order in this proceeding,[62] is hereby dissolved.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

47 C.F.R. Part 94 of the Commissions Rules is amended as follows:

1. The authority citation for Part 94 continues to read as follows:

Authority: Sections 4, 303, 48 STAT., as amended, 1066, 1082, 47 U.S.C. 154, 303, unless otherwise noted.

2. 47 C.F.R. § 94.3 is amended by revising the definition of 'Multiple address' to read as follows:

§ 94.3 Definitions.

* * * * *

Multiple address. A multiple address radio system is a point-to-multipoint communications system, either one-way or two-way, utilizing frequencies listed in § 94.65(a)(1) and serving a minimum of four remote stations. If a master station is part of the multiple address system, the remote stations must be scattered over the service area in such a way that two or more point-to-point systems would be needed to serve those remotes.

* * * * *

3. 47 C.F.R. § 94.63 is amended by revising paragraph (d)(4)(i) to read as follows:

§ 94.63 Interference protection criteria for operational fixed stations.

* * * * *

(d) * * *

(4) * * *

(i) For multiple address stations in the 928-960 MHz band a statement that the proposed system complies with the following co-channel separations from all existing stations and pending applications.

Fixed-to-fixed	145 km (90 miles)
Fixed-to-mobile	113 km (70 miles)
Mobile-to-mobile	81 km (50 miles)

* * * * *

FOOTNOTES

[1] Report and Order, PR Docket No. 87-5, 3 FCC Rcd 1564 (1988) (*Report and Order*).

[2] On April 26, 1988, Digital filed a Request for Stay and Petition for Reconsideration in contravention of Section 1.44(e) of our rules, 47 C.F.R. § 1.44(e), which requires separate pleadings. We granted a partial stay, limited to the separation criteria in Section 94.63 of the revised rules, 47 C.F.R. § 94.63, in a separate order pending this reconsideration. 3 FCC Rcd 4742 (1988). The remaining petitioners filed on May 12, 1988. Radscan filed a Petition for Reconsideration. API filed a joint Statement in Support of Stay and Petition for Partial Reconsideration. Granger filed a Petition for Reconsideration and UTC filed a Petition for Reconsideration and Clarification.

[3] Granger limited its petition for reconsideration to the single issue of the scattering requirement of the MAS definition. Granger Petition, 2.

[4] Granger Petition, 14-15.

[5] MDS filed on June 16, 1988. Motorola filed on June 17, 1988.

[6] EnScan "Partial Opposition," 1-2 n.1 (filed June 17, 1988).

[7] Nitech Opposition, 8 (filed June 8, 1988).

[8] Digital Reply filed July 7, 1988.

[9] *Report and Order*, at ¶ 2.

[10] *Id.* at ¶ 5 n.2 and accompanying text.

[11] *Id.*

[12] Assuming 25 mile radii, this resulted in a master-to-master separation of 120 miles.

[13] *Report and Order*, ¶ 48.

[14] We adopted standards of 65 miles and 50 miles, respectively. *Id.* at ¶ 50.

[15] *Id.* at ¶ 17.

[16] *Id.* at ¶ 39. We also adopted a number of other revisions that are not at issue here.

[17] *See* Revised Section 94.63, 47 C.F.R. § 94.63 (Interference protection criteria for operational fixed stations).

[18] *See, e.g.*, Digital Petition, 16; Radscan Petition, 3; API Petition, 9; UTC Petition, 16.

[19] Digital Petition, 8; API Petition, 13-14.

[20] The definition clarifies that scattering of remote stations is required for a system to be established on MAS frequencies. *See* Granger Petition, 7, 11-14; UTC Petition, 7; API Petition, 15-18.

[21] 3 FCC Rcd 4742 (1988).

[22] Clients of the law firm of Keller and Heckman have requested clarification of the grandfathering provisions contained in Section 94.65, 47 C.F.R. § 94.65. *See* Letter to F. Ronald Netro, Chief, Rules Branch, Private Radio Bureau, dated July 20, 1988. The Bureau responded to the letter on August 25, 1988. Keller and Heckman have asked for reconsideration of the Bureau's position. We will address these provisions in a separate rule making proceeding. In the interim, the Bureau's position should be followed.

[23] *Report and Order*, ¶ 48.

[24] We assumed a desired signal at the edge of the MAS service area of -91dBm and an interfering signal of -111dBm. *Id.*

[25] We assumed a service area of 25 miles. *Id.* at ¶ 46.

[26] *See* "Development of VHF & UHF Propagation Curves for TV and FM Broadcasting," FCC Report No. R-6602 (1966).

[27] We assumed the remote was located at the edge of the desired station's service area (25 miles) on a straight line between the desired station and undesired station. *Report and Order*, ¶ 48.

[28] Digital Petition, 16; Radscan Petition, 3; API Petition, 9; UTC Petition, 16.

[29] Digital Petition, 4-5.

[30] UTC Petition, 16-17; Radscan Petition, 7.

[31] UTC Petition, 16; Radscan Petition, 7.

[32] Radscan Petition, 6; UTC Petition, 16; API Petition, 9.

[33] Radscan Petition, 13; UTC Petition, 17; API Petition, 21. *Cf.* Digital Petition, 18 and Digital Reply, 10 (minimum separation of 120 miles requested).

[34] Motorola Opposition, 5-6; MDS Opposition, 3-5.

[35] Because the point-to-multipoint nature of MAS is similar to that of land mobile operations, we used the R-6602 curves in determining an appropriate mileage separation. We believe another model, one which is better suited for analysis of microwave operations in the 900 MHz range, should be used instead. Thus, our analysis is now based on a troposcatter propagation model. Further, contrary to the petitioners' contentions, the record does not support that this service was ever established on a 99.9% service reliability. The rules we ultimately adopted were not designed to guarantee the level of service suggested by the petitioners. *See* Second Report and Order, PR Docket 79-18 ¶ 13. The mileage separation standard was established without regard to a particular degree of service reliability; rather, we sought to provide sufficient interference protection to allow MAS licensees to build a quality service. Our analysis here assumes that a 95% reliability will enable licensees to achieve the service reliability necessary to the types of communications provided by MAS applications. Moreover, the 95% figure refers only to a degree of reliability that can be reasonably attained at the fringe of the service area; the overall service probability is much higher. This 95% figure can be exceeded through the licensee's use of specialized equipment and/or system design. In short, while we do not guarantee interference-free service at all times, licensees can still achieve traditional levels of MAS service reliability. *See infra* note 36.

[36] A directional antenna typically provides a 10 dBi gain and a 20 dB front-to-back ratio. *See, e.g.*, 47 C.F.R. § 94.75(b) n.4. In addition, it will still be possible to employ omnidirectional antennas at most locations. Use of directional antennas will be at the discretion of licensees. Directional antennas are likely to be necessary only at the fringe of a service area, closest to another co-channel system meeting the required separation.

[37] *Report and Order*, ¶ 50.

[38] API Petition, 12-13.

[39] *See* EnScan Opposition, 12; Nitech Opposition, 2 and 9-10.

[40] Digital Petition, 16; Radscan Petition, 14 (Both citing Small Refinery Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983). *But see infra* note 43 and accompanying text.

[41] API Petition, 13-14.

[42] Small Refinery Lead Phase-Down Task Force v. E.P.A., 705 F.2d at 547 (Court discusses a continuum along which a rule will be upheld if a "logical outgrowth" of the proposal but rejected if it deviates "too sharply").

[43] International Harvester v. Ruckelshaus, 478 F.2d at 632 n. 51 (Contrary conclusion would result in the "absurdity that in rule-making under the APA the agency can learn from the comments on its proposals only at the peril of starting a new round of commentary.")

[44] Natural Resources Defense Counsel, Inc. v. EPA, 822 F.2d 104, 112 (D.C. Cir. 1987) (additional citation ommitted). *Accord* Spartan Radiocasting Co. v. FCC, 619 F.2d 314, 322 (4th Cir. 1980).

[45] *Notice of Proposed Rule Making*, PR Docket No. 87-5, 2 FCC Rcd 553 (1987) at ¶¶ 1, 44, & 57-58 (*Notice*).

[46] Motorola Comments, 12; MDS Comments, 9-10.

[47] API Reply Comments, 3-4; Radscan Reply Comments, 12. *Cf.* Digital Reply Comments, 13-17 (extensive analysis; retain 70 mile between service area criterion). *But cf.* Multipoint Networks Reply Comments, 2-3 (supports 75 mile standard; 110 mile proposal "unnecessarily conservative").

[48] For similar reasons, we disagree with API that our adoption of mobile separation standards was also procedurally defective. *See* API Petition, 12-13. The *Notice* requested comments on such standards and suggested that mobile separation criteria could be less than the standard used for fixed operations. *See Notice*, ¶ 59. In line with the *Notice*, and based upon the comments received and using the same technical assumptions that underlied the fixed separation standard, we concluded that a 50-mile separation requirement for mobile-to-mobile and a 65-mile separation requirement for fixed-to-mobile would be adequate. *Report and Order*, at ¶¶ 49-50.

[49] *Report and Order*, ¶ 6.

[50] *Id.* at ¶ 7.

[51] Granger Petition, 7-11; UTC Petition, 5-10. In addition, API argues that the revised definition of scattering in Section 94.3 is too vague to be enforceable. *See* API Petition, 15-16.

[52] In the proceeding in which we intially proposed to reallocate frequencies for MAS use, we observed that, "[T]he radio system contemplated would consist of one or more control or master stations and a large number of responding stations *scattered* over much of the licensee's service area." Notice of Proposed Rule Making, Docket No. 79-18, ¶ 12 (released March 1, 1979) (emphasis added). Accordingly, the existing definition of 'multiple address' specifies that the operation of a multiple address radio system "is normally from a fixed or mobile station transmitting and/or receiving (usually in an omnidirectional pattern) to or from multiple (four or more) fixed remote stations." 47 C.F.R. § 94.3 (Definitions).

[53] Operation in an "omnidirectional pattern" necessarily implies that the remote stations be located, or scattered, such that a number of point-to-point systems would be necessary to accomplish the same communications objectives.

[54] *See Report and Order*, ¶ 10.

[55] The revised definition of "multiple address system" we are adopting here is a clarification of our existing MAS licensing policies. As such, it is an interpretive rule for which notice and comment procedures are not required. *See* 5 U.S.C. § 553(b)(A). We further note that systems requiring special consideration in this area can be handled through the rule waiver process.

[56] UTC also asked us to grandfather any licensed MAS systems that were not in compliance with the "more than two" scattering requirement. Given the revised rule adopted here, it is not clear whether there are any licensed but non-complying systems. Moreover, we have not as a matter of policy licensed point-to-point, *i.e.*, non-scattered, systems on MAS frequencies except by waiver. We will, however, grandfather any such non-complying systems that inadvertently may have been licensed.

[57] *Report and Order*, ¶ 17.

[58] *Id.* at ¶ 23.

[59] *Id.*

[60] *Id.*

[61] 47 C.F.R. § 1.962(c)(4).

[62] 3 FCC Rcd 4742 (1988).

CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

RE: Memorandum Opinion and Order in PR Docket No. 87-5 Addressing Amendments to the Commission's Rules Governing Multiple Address Frequencies.

I am concurring with the change in the co-channel mileage separation standard from 75 miles, as adopted by the Commission in the *Report and Order* in this proceeding, to 90 miles as presented in this *Memorandum Opinion and Order*. Petitioners argued that the reliability needed to provide quality service dictates greater co-channel mileage separation. The Bureau admits that it used the R-6602 curves in determining an appropriate mileage separation, since the point-to-multipoint nature of MAS is similar to that of land mobile operations. On reconsideration, the Bureau is now using a troposcatter propagation model as a better suited analysis of microwave operations at 900 MHz. Even with this "better suited analysis" the Commission is not assuring a 99.9 percent reliability of service measure deemed essential to petitioners. The Bureau's analyses and the Commission's decision in this proceeding raises several concerns.

The Commission should study and establish reasonable service areas not only for utilities, but also for other services. Since future demand for spectrum will be based on the calculations used to determine services areas, the Bureau should define service areas thereby allowing it to develop long-range planning taking into account practicably available equipment. Action to date in this proceeding appears to be at best ad hoc. Generally, I believe our responsibility is to ensure that licensees operate on an interference free basis. Such responsibility requires the Commission to develop sound measures for separation standards.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-219

In the Matter of

Amendment of Section 73.202(b), RM-6213
Table of Allotments,
FM Broadcast Stations.
(Uniontown, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 28, 1989; Released: March 22, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 3161 (1988), issued in response to a petition filed on behalf of William A. Gunter and Robert J. Long (petitioners), proposing the allotment of Channel 298A to Uniontown, Alabama, as that community's first local FM service. Petitioners filed supporting comments reiterating their intention to apply for Channel 298A, if allotted. No other comments were received.

2. As indicated in the *Notice*, Channel 298A can be allotted to Uniontown in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 4.9 kilometers (3.1 miles) southwest[1] of the community to avoid short-spacing to Station WENN-FM, Channel 299C, Birmingham, Alabama,[2] and to Station WMJW(FM),[3] Channel 298C1, Magee, Mississippi.[4]

3. On the basis of the above, the Commission believes the public interest would be served by allotting Channel 298A to Uniontown, Alabama, since it could provide a first local FM service to the community.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 8, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Uniontown, Alabama	298A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 298A will open on **May 9, 1989,** and close on **June 8, 1989.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Reference coordinates at the restricted site for Channel 298A are 32-24-46 and 87-32-25.

[2] Reference coordinates at the licensed site of Station WENN-FM, Channel 299C are 33-43-52 and 86-37-57.

[3] Formerly Station WSJC-FM.

[4] The 196 kilometer minimum distance separation required between Class A and C1 co-channels is met based upon the construction permit issued to Station WMJW(FM) at reference coordinates 32-15-28 and 89-47-22. However, the allotment of Channel 298A at Uniontown is conditioned upon Station WMJW(FM) receiving a license in accordance with its construction permit to relocate its site and modify its facilities to specify Channel 298C1 (BPH-870623ID).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-415

In the Matter of

Amendment of Section 73.202(b), RM-6401
Table of Allotments,
FM Broadcast Stations.
(Kalispell, Montana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 28, 1989; Released: March 22, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 5253 (1988), issued in response to a petition filed by KOFI, Inc. (petitioner), proposing the substitution of FM Channel 280C1 for Channel 280A at Kalispell, Montana, and modification of its construction permit for Station KOFI, to specify the new channel. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 280C1 for Channel 280A at Kalispell, Montana, since it could provide the community with an additional wide coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at the authorized site for Channel 280A.[1] Since Kalispell is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained. In addition, we have authorized a modification of the petitioner's construction permit[2] for Channel 280A to specify operation on Channel 280C1 in accordance with Section 1.420(g) of the Commission's Rules since no other expressions of interest have been received.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 8, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Kalispell, Montana	246C, 253C, 280C1

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Channel 280A, Kalispell, Montana, IS MODIFIED to specify operation on Channel 280C1, in lieu of Channel 280A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 280C1 at Kalispell are 48-11-52 and 114-15-03.

[2] BPH870527MD.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-398

In the Matter of

Amendment of Section 73.202(b), RM-6389
Table of Allotments,
FM Broadcast Stations.
(Rogers City, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 28, 1989; Released: March 22, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 5353 (1988), issued in response to a petition filed by North South Radio Group, Inc. (petitioner), proposing the substitution of FM Channel 244C2 for Channel 249A at Rogers City, Michigan. Petitioner also requested modification of its license for Station WMLQ, Channel 249A, to specify operation on the new channel. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. MacDonald Broadcasting Company, licensee of Station WWLZ(FM), Cadillac, filed comments supporting the upgrade and modification at Rogers City for Station WMLQ.

2. We believe the public interest would be served by the substitution of Channel 244C2 for Channel 249A at Rogers City, Michigan, since it could provide the community with its first wide coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at the site specified by petitioner.[1] Since Rogers City is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained. In addition we have authorized a modification of the petitioner's license for Station WMLQ, Rogers City, Michigan, to specify operation on Channel 244C2 in accordance with Section 1.420(g) of the Commission's Rules, since no other expressions of interest have been received.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED. That effective **May 8, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Rogers City, Michigan	244C2

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WMLQ, Rogers City, Michigan, IS MODIFIED to specify operation on Channel 244C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 244C2 at Rogers City are 45-25-17 and 83-49-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-434

In the Matter of

Amendment of Section 73.202(b), RM-6416
Table of Allotments,
FM Broadcast Stations.
(Flora, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 28, 1989; Released: March 22, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 5580 (1988), proposing the allotment of FM Channel 248A to Flora, Mississippi, as that community's first FM service. The *Notice* was issued in response to a petition filed by John H. Pembroke (petitioner). The petitioner filed comments restating his interest in the allotment. No other comments were received.

2. Channel 248A can be allotted to Flora, Mississippi, consistent with the minimum distance separation requirements of Section 73.207 of the Commission's Rules provided there is a site restriction 9.4 kilometers (5.8 miles) northwest of the community.[1] The site restriction will prevent a conflict with Station WRJH, Channel 249A, Brandon, Mississippi.

3. In view of the fact that Channel 248A can be allotted to Flora to provide the community with its first FM broadcast service, we find the allotment to be in the public interest. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 8, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Flora, Mississippi	248A

4. The window period for filing applications for Channel 248A at Flora will open on **May 9, 1989,** and close on **June 8, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 248A at Flora are 32-36-03 and 90-23-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-412

In the Matter of

Amendment of Section 73.202(b), RM-6369
Table of Allotments,
FM Broadcast Stations.
(Ramsey and Shelbyville, Illinois)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 22, 1989; Released: March 22, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 5259 (1988), issued in response to a petition filed by Kin Do Communications, Inc. (petitioner) licensee of Station WSHY-FM, Channel 285A, at Shelbyville, Illinois, proposing the substitution of Channel 286B1 for Channel 285A and modification of its license accordingly. The *Notice* also proposed the substitution of Channel 227A for unused Channel 287A at Ramsey, Illinois, in order to accomplish the proposed substitution at Shelbyville. As stated in the *Notice*, there is one pending application for Channel 287A at Ramsey, Illinois (BPH851028ME), filed by Henry J. Voss. Petitioner filed supporting comments. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 286B1 for Channel 285A at Shelbyville, since it could provide a first wide coverage area broadcast station to serve the community. The substitution can be made in compliance with the Commission's minimum distance separation requirements at petitioner's present transmitter site.[1]

3. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station WSHY-FM to specify operation on Channel 286B1 in lieu of Channel 285A at Shelbyville, Illinois. As indicated in the *Notice*, Channel 227A will be substituted for unused Channel 287A at Ramsey, Illinois.[2] A construction permit was granted to the applicant for Channel 287A at Ramsey on October 18, 1988, conditioned on the outcome of this proceeding. We will modify the permit to specify operation on the new channel.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 8, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Ramsey, Illinois	227A
Shelbyville, Illinois	286B1

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WSHY-FM, Shelbyville, Illinois, IS MODIFIED, to specify operation on Channel 286B1 in lieu of Channel 285A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit for the permittee at Ramsey, Illinois, IS MODIFIED, to specify operation on Channel 227A in lieu of Channel 287A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Construction Permit BPH851028ME except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules. PROVIDED the transmission facilities comply in all respects with Construction Permit BPH851028ME except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

7. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the permittee of Channel 287A, as follows: Henry J. Voss, S. Fayette Street RR 2, Ramsey, Illinois 62008.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates at Shelbyville, Channel 286B1 are 39-24-05 and 88-49-00.

[2] The coordinates at Ramsey, Channel 227A are 39-08-06 and 89-06-02.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-368

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Burnside, Kentucky) — RM-6286

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 22, 1989; Released: March 22, 1989

By the Chief, Allocations Branch:

1. Pursuant to the request of Lenn R. Pruitt (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 4657 (1988), proposing the substitution of Channel 230C2 for Channel 230A at Burnside, Kentucky, and the modification of its license for Station WJDJ(FM) to specify operation on the higher powered channel. Petitioner filed comments reaffirming its intention to apply for the channel, if allotted. No other comments were received.

2. As stated in the *Notice*, Channel 230C2 can be allotted to Burnside at the petitioner's specified site 19.1 kilometers (11.9 miles) northeast[1] of the city and meet the spacing requirements of Section 73.207 of the Commission's Rules.

3. Based on the above discussion, we believe that the public interest would be served by substituting Channel 230C2 for Channel 230A at Burnside, Kentucky, since it could provide that community with its first local wide coverage area FM service. Channel 230C2 can be allotted to Burnside in compliance with the Commission's minimum distance separation requirements with a site restriction of 19.1 kilometers (11.9 miles). As proposed, we shall also modify petitioner's license for Station WJDJ(FM) to specify operation on Channel 230C2 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 8, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Burnside, Kentucky	230C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Lenn R. Pruitt for Station WJDJ(FM), Burnside, Kentucky, IS MODIFIED, effective **May 8, 1989** to specify operation on Channel 230C2 in lieu of Channel 230A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 230C2 at the petitioner's specified site are 37-08-30 and 84-30-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 22, 1989

THE BELL ATLANTIC TELEPHONE COMPANIES AND US WEST FILE REVISIONS TO THEIR COST ALLOCATION MANUALS

On February 28, 1989, The Bell Atlantic Telephone Companies and US West each filed proposed revisions to their permanent cost allocation manuals for the separation of regulated and nonregulated costs. The companies filed their original manuals in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987).

Parties may file comments on the proposed revisions to the cost manuals no later than **April 13, 1989.** Replies should be filed by **April 28, 1989.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are also available for public inspection in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT INTERNATIONAL, INCORPORATED — File No. I-T-C-89-041

Application for authority to acquire and operate facilities for service to Peru.

MCI TELECOMMUNICATIONS CORPORATION — File No. I-T-C-89-042

Application for authority to acquire and operate facilities for service to Peru.

ORDER AUTHORIZATION AND CERTIFICATE

Adopted: March 14, 1989; Released: March 22, 1989

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on January 9 and 11, 1989, respectively, by TRT International, Inc. (TRTI) and MCI Telecommunications Corp. (MCI) requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for direct service between the U.S. and Peru and beyond. The applications were placed on public notice on January 18, 1989. No comments were received. Upon consideration of the applications, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Peru by TRTI and MCI.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-89-041 and I-T-C-89-042 ARE GRANTED, and

a. TRTI is authorized to:

1. lease from Comsat and operate 12 voice-grade satellite circuits between the Etam, West Virginia earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Peru furnished by TRTI's correspondent Entel Peru;

2. lease from AT&T and operate 12 voice-grade circuit in the Etam, West Virginia earth station;

3. lease and operate connecting facilities between the Etam earth stations and TRTI's New York Office; and

4. use said facilities to provide switched message telephone service between the U.S. and Peru and beyond.

b. MCI is authorized to:

1. lease from Comsat and operate 36 voice-grade satellite circuits between an appropriate east coast earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Peru, furnished by MCI's correspondent Entel Peru;

2. lease from AT&T and operate 36 voice-grade circuits in the east coast earth station;

3. lease and operate connecting facilities between the east coast earth station and MCI's West Orange, New Jersey operating center; and

4. use said facilities to provide MCI's regularly authorized services between the U.S. and Peru and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between TRTI and MCI and their correspondent in Peru, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. This authorization shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1987).

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DIAL ONE U.S.A., INCORPORATED — File No. I-T-C-89-047

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 14, 1989; Released: March 22, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on January 24, 1989 by Dial One U.S.A., Incorporated (Dial One), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on February 1, 1989. No comments were received.

2. The applicant is already providing domestic resale services. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by Dial One.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-89-047 IS GRANTED, and Dial One is authorized to provide international switched voice services by the resale of the international switched voice services set forth in US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the United States and those points listed in that tariff.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1987).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc. 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEDIAL AMERICA, INCORPORATED — File No. I-T-C-89-048

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 14, 1989; Released: March 22, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on January 24, 1989 by Teledial America, Incorporated (Teledial), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on February 8, 1989. No comments were received.

2. The applicant is already providing domestic resale services. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by Teledial.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-89-048 IS GRANTED, and Teledial is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the United States and those points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1987).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc. 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GEORGIA POWER COMPANY,
Complainant,

v. File No. PA-84-0002

LIBERTY TV CABLE, INC.,
Respondent.

In the Matter of

GEORGIA POWER COMPANY,
Complainant,

v. File No. PA-84-0003

COLUMBUS CABLEVISION, INC.,
TWENTY CATV, INC., and
TELE-COMMUNICATIONS, INC.
Respondents.

ORDER

Adopted: March 15, 1989; Released: March 23, 1989

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. We have before us a joint motion filed by Georgia Power Company (Georgia Power), Liberty TV Cable, Inc. (Liberty) and Columbus Cablevision, Inc., Twenty CATV, Inc. and Tele-Communications, Inc. (collectively "TCI") on January 29, 1989. The parties request that we approve a settlement agreement between the parties establishing the rates for cable television pole attachments to Georgia Power poles for calendar years 1985, 1986, 1987 and 1988. For the reasons set forth below, we grant the parties' motion.

2. These proceedings were initiated by complaints filed by Georgia Power against Liberty (PA-84-0002) and TCI (PA-84-0003) under Section 224 of the Communications Act, 47 U.S.C. § 224, alleging that the cable television pole attachments to Georgia Power poles charged to the defendants were unjust and unreasonable. On April 5, 1984, the Bureau ruled in favor of the defendants. *Memorandum Opinion and Order*, Mimeo No. 3314 (released April 5, 1984), *rev. denied*, FCC 84-410 (released September 7, 1984). On October 8, 1984, Georgia Power petitioned for judicial review of the Bureau's decision. *Georgia Power Company v. FCC*, No. 84-1494 (D.C. Cir.). Following the decision of the United States Court of Appeals in *Alabama Power Company v. FCC*, 773 F.2d 362 (D.C. Cir. 1985), Georgia Power and the Commission stipulated to a remand of the complaint proceedings for further consideration in light of that case.

3. Following remand, the Commission in *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387 (1987), revised the formula employed to determine just and reasonable pole attachment rates. *See* 47 C.F.R. §§ 1.1401-1.1415. Subsequently, Georgia Power, along with two of its corporate affiliates, petitioned for judicial review of that decision as well. *Georgia Power Company v. FCC*, No. 87-1423 (D.C. Cir.)

4. In their instant motion, the parties state that Georgia Power has settled all of its outstanding pole attachment disputes involving the defendants and other cable TV operators and that the parties hereto have agreed to appropriate rates for attachment of cable television facilities to Georgia Power's poles for the period in controversy. The parties further state that an order by the Commission authorizing these rates is required to give effect to the terms of their settlement and will enable them to implement the settlement, and rate agreements pursuant thereto, without resort to further Commission proceedings.

5. After careful consideration of the parties' joint motion, we are satisfied that there are no longer issues in controversy and that acceptance of the parties' settlement agreement is in the public interest.

6. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 and 1.1401-1.1415 of the Commission's Rules, 47 C.F.R. §§ 0.291 and 1.1401-1, that the above-captioned complaints filed by Georgia Power Company ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

7. IT IS FURTHER ORDERED that the terms for pole attachment rates set forth in the joint motion of the parties ARE HEREBY AUTHORIZED.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

CABLEVISION OF AUGUSTA, INC.,
Complainant,

v. File No. PA-83-0013

GEORGIA POWER COMPANY,
Respondent.

ORDER

Adopted: March 15, 1989; Released: March 23, 1989

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On January 26, 1983, Cablevision of Augusta, Inc. filed the above-captioned complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. 224, seeking a determination that Georgia Power Company had imposed unjust and unreasonable rates for certain cable television pole attachments. On April 5, 1984, the Commission ruled in favor of the complainants,[1] but subsequently, the United States Court of Appeals for the District of Columbia Circuit vacated the Commission's decision and remanded the matter for further proceedings. *Georgia Power Co. v. FCC*, No. 84-1494 (D.C. Cir. Mar. 31, 1987). Subsequently, the parties entered into settlement negotiations with the cooperation of the Enforcement Division.

2. On January 25, 1989, Jones Intercable, Ltd, successor in interest to Cablevision of Augusta, Inc., and Georgia Power Company reached a settlement agreement that resolves the matters in controversy and which stipulates to the dismissal of the captioned proceeding. Therefore, we conclude that there are no longer issues in controversy and the proceeding should be terminated.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the complaint filed by Cablevision of Augusta, Inc. IS DISMISSED and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] Memorandum Opinion and Order, Mimeo No. 3314 (released Apr. 5, 1984); *rev. denied*, FCC 84-410 (Sept. 7, 1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WOMETCO CABLE TV OF FAYETTE COUNTY, INC.;
WOMETO CABLE TV OF GEORGIA, INC., d/b/a Douglas County Cable TV;
WOMETO CABLE TV OF GEORGIA, INC., d/b/a Gwinnett County Cable TV;
WOMETO CABLE TV OF GEORGIA, INC., d/b/a Satellite County Cable TV;
WOMETO CABLE TV OF CLAYTON COUNTY, INC.;
WOMETCO CABLE TV OF COBB COUNTY, INC.; and
WOMETCO CABLE TV OF FULTON COUNTY, INC.
Complainants,

v. File No. PA-83-0022

GEORGIA POWER COMPANY,
Respondent.

In the Matter of

ALERT CABLE TV, INC.
Complainant,

v. File No. PA-83-0015

GEORGIA POWER COMPANY,
Respondent.

ORDER

Adopted: March 15, 1989; Released: March 23, 1989

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. The above-captioned complaints were originally filed with the Commission on May 6, 1983 (PA-83-0022) and January 26, 1983 (PA-83-0015) pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224. The complainants requested a determination that Georgia Power had imposed unjust and unreasonable rates for certain cable television pole attachments. On April 5, 1984, the Commission ruled in favor of the complainants,[1] but subsequently, the United States Court of Appeals for the District of Columbia Circuit vacated the Commission's decision and remanded the matter for proceedings. *Georgia Power Co. v. FCC*, No. 84-1494 (D.C. Cir. Mar. 31, 1987). Subsequently, the parties entered into settlement negotiations with the cooperation of the Enforcement Division.

2. On January 29, 1989, the parties filed with the Commission a settlement agreement that resolves the matters in controversy and which stipulates to the dismissal of the complaint proceedings. Therefore, we conclude that there are no longer issues in controversy and the proceedings should be terminated.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the above-captioned complaints ARE DISMISSED and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] Memorandum Opinion and Order, Mimeo No. 3314 (released Apr. 5, 1984); *rev. denied*, FCC 84-410 (released Sept. 7, 1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GEORGIA POWER COMPANY
Complainant.

v. File No. PA-80-0022

COLUMBUS CABLEVISION, *et al*
Respondents.

In the Matter of

LIBERTY TV CABLE, INC.
Complainant.

v. File No. PA-82-0008

GEORGIA POWER COMPANY
Respondent.

ORDER

Adopted: March 15, 1989; Released: March 23, 1989

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On January 29, 1989, the parties to the above-captioned proceedings[1] filed with the Commission a settlement agreement which resolves all the issues in controversy and stipulates to the dismissal of the complaint proceedings.

2. On the basis of the statements contained in the parties' filing, we conclude that there are no longer issues in controversy and the proceedings should be terminated.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the above-captioned complaints ARE DISMISSED and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] Georgia Power Company, Liberty TV Cable, Inc., Columbus Cablevision, Inc., Twenty CATV, Inc. and Tele - Communications, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 23, 1989

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PACIFIC'S PETITION FOR SPECIAL CONSIDERATION (CC DOCKET 88-616)

On February 28, 1989, Pacific Bell Directory (Pacific) filed a petition for special consideration and a notification of a market trial of an enhanced, audiotex gateway service known as SMART Talk. Pacific's petition seeks a waiver of the Commission's standard 8-month period for conducting enhanced service market trials, and requests that the Commission allow it a 20-month trial period. Pacific states that an 8-month trial period is not sufficient to allow it to conduct a proper trial.

Pacific proposes to conduct a market trial of SMART Talk in conjunction with distribution and use of its printed yellow pages. According to Pacific, its yellow pages directories will feature a unique 7 digit access number for SMART Talk printed on the top of each page. By dialing the access number, a customer may access an advertiser's audiotex message. Pacific contends that because SMART Talk will refer to the advertising in the printed yellow page directories, Pacific requires additional time for the trial. Otherwise, it argues, the printed directories that include the access number would confuse customers that would attempt to dial SMART Talk after the end of an 8-month trial.

A recent Common Carrier Bureau order permits BOCs to conduct market trials of enhanced services for 8-month periods without filing comparably efficient interconnection (CEI) plans if they conform to six specific conditions. (*See* BOC Notices of Compliance with CEI Waiver Requirements for Market Trials of Enhanced Services, Memorandum Opinion and Order, DA 88-2058, released Jan. 30, 1989) Among other things, a BOC conducting such a trial must file with the Commission a written notification demonstrating how the BOC will satisfy the conditions described in the Order. The Commission noted that it would consider waivers of the 8-month time period if a BOC can demonstrate a unique need to conduct a longer trial.

Interested parties should file comments on the Petition for Special Consideration by **April 12, 1989,** and reply comments by **April 24, 1989,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of Pacific's Petition can be obtained from ITS at (202) 857-3800.

For further information contact Steven Gorosh, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 23, 1989

SOUTH CENTRAL BELL TELEPHONE COMPANY FILES APPLICATION TO ACQUIRE HUGHES TELEPHONE COMPANY, INC., OF BAILEY, MISSISSIPPI

South Central Bell Telephone Company (South Central Bell), a wholly owned subsidiary of BellSouth Corporation, has filed an application pursuant to Section 221(a) of the Communications Act of 1934, 47 U.S.C. § 221(a), and Part 66 of the Commission's Rules, 47 C.F.R. §§ 66.11-66.15, for authority to acquire, via merger, Hughes Telephone Co., Inc. (Hughes), a wireline, local exchange telephone company located in Bailey, Mississippi.

The application referred to has been found on initial review to comply with Commission requirements for filing. The Commission reserves the right to return the application if, on more detailed review, it is defective in any particular, or does not comply with any Commission requirement.

Any interested party wishing to file comments in support or in opposition to the referenced application shall file such comments no later than 30 days after the release date of this Public Notice. Applicant's replies to said comments shall be filed no later than 15 days thereafter. Comments, replies and any other pleadings and documents filed in this matter shall refer to File No. ENF-89-07.

Copies of the subject application and any subsequently filed documents pertaining to the application may be obtained from International Transcription Services, Inc., 2100 "M" Street, N.W., Washington, D.C. 20554. For further information contact Thomas J. Beers at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

LEWISTON-AUBURN CELLULAR, INC.,
Assignor

File No. 01587-CL-AL-1-88

PORTLAND CELLULAR PARTNERSHIP
Assignee

For Consent to the Assignment of the Construction Permit of Station KNKA717 currently licensed for the Lewiston-Auburn, Maine NECMA on frequency Block B in the Domestic Cellular Radio Telecommunications Service

MEMORANDUM OPINION AND ORDER

Adopted: March 16, 1989; Released: March 23, 1989

By the Acting Chief, Mobile Services Division:

1. Lewiston-Auburn Cellular, Inc. (LAC), Assignor, and Portland Cellular Parnership (Port Cell), Assignee, have filed an application requesting that we approve the assignment of the construction permit of Station KNKA717, in the Lewiston-Auburn, Maine New England County Metropolitan Area (NECMA) on cellular frequency Block B.[1] Northeast has filed comments concerning the captioned application. LAC and Port Cell have filed a joint reply to Northeast's comments.

I. BACKGROUND AND CONTENTIONS OF THE PARTIES

2. The contentions of the parties are virtually identical to those set forth in *Portland Cellular Partnership*, DA 89-267 (released Mar. 13, 1989) (*Portland*). Northeast, an unsuccessful wireline applicant in both the Lewiston-Auburn and Portland, Maine NECMAs, filed various administrative appeals and one judicial appeal surrounding the grants of the construction permits of LAC (the Lewiston-Auburn wireline tentative selectee) and Port Cell (the Portland wireline tentative selectee). In its Comments, Northeast states that it does not object to the request to assign the Lewiston construction permit to Port Cell but it does request that any action granting the requested assignment be conditioned upon the outcome of Northeast's appeals. In support, Northeast asserts that as long as administrative or judicial appeals are pending, Commission grants are not final for administrative law purposes and, thus, the Commisision is not allowed to take action which would deprive Northeast of its possible future rights in either market.

3. LAC and Port Cell in reply incorporate by reference the joint reply they filed in *Portland*, arguing that a conditional grant is both unjustified and unnecessary because there is no reason to believe that Northeast's appeals would be successful in either market. Moreover, they assert, Northeast is ineligible to be the wireline licensee in either Lewiston-Auburn or Portland because Northeast does not have a wireline presence in either of the two markets. Asserting that an unconditional grant of the assignment does not prejudice any possible future rights Northeast thinks it might have, LAC and Port Cell conclude that the assignment should be granted without conditions.

II. DISCUSSION

4. Northeast does not object to a grant of the assignment, and we conclude that Northeast has not shown that such a grant would prejudice any future rights it may have. *See Portland*, slip op. at para. 5. There are no administrative or judicial appeals pending at this time, and if Northeast is successful in any subsequent appeal it might file, we will have an opportunity to address the issues raised by Northeast at that time.

5. Insofar as the requested assignment itself is concerned, the assignment is part of a merger transaction whereby LAC will obtain an interest in the Portland system in exchange for an interest in the Lewiston-Auburn system. LAC and Port Cell have shown that the resulting arrangement will enable LAC and Port Cell to provide better service to the public because construction and operation of both adjacent systems by the same company will be more economical and efficient. We find this to be in the public interest and, consequently, we approve the assignment.

III. ORDERING PARAGRAPH

6. ACCORDINGLY, IT IS ORDERED, pursuant to Section 0.291 of the Commission's Rules, that the application of Lewiston-Auburn Cellular, Inc. and Portland Cellular Partnership, File No. 01587-CL-AL-1-88, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Acting Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] *See* Public Notice, Rpt. No. CL-88-139, Mimeo No. 4014 (released Aug. 4, 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-68

In the Matter of

Amendment of Section 73.606(b), RM-6382
Table of Allotments,
TV Broadcast Stations.
(Clermont and Cocoa, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 7, 1989; Released: March 23, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed jointly by Brevard Community College, licensee of noncommercial educational TV Station WRES-TV, Channel *18, Cocoa, Florida, and Press Television Corporation, permittee of commercial TV Station WCLU-TV, Channel 68, Clermont, Florida (petitioners). Petitioners request exchange of their channels of operation, pursuant to Section 1.420(h) of the Commission's rules and consistent with the Commission's *Report and Order* in MM Docket 85-41, 59 RR 2d 1455 (1986).

2. Cocoa is located about 60 kilometers (km) southeast of Orlando, Florida, and the existing Channel 18 Station WRES-TV site is about 8 km west of Cocoa. Petitioners indicate that this proposal will permit Station WRES-TV to construct a new facility with greater power and a higher antenna height using the existing tower of Station WMOD-TV, Channel 43, Melbourne, Florida. This tower is approximately 18 km west of Cocoa. Clermont is located about 40 km west of Orlando and the authorized Channel 68 Station WCLU-TV site is approximately 60 km northeast of Clermont (40 km north of Orlando). Petitioners indicate that to compete in the Orlando market, they must move the WCLU-TV site to the de facto Orlando antenna farm near Bithlo, Florida. The proposed site for Station WCLU-TV Channel 18 operation is about 30 km east of Orlando and 64 to 68 km east of Clermont. Petitioners point out that using the Commission's standard prediction method, the field strength that the Commission requires over the entire principal community in accordance with Section 73.685(a) of the Commission's rules would not be provided to Clermont. Extensive supplemental information is provided to demonstrate actual compliance with the city grade coverage requirement.

3. While we have a number of concerns that will be set forth below, petitioners have submitted sufficient information to warrant a *Notice of Proposed Rule Making* requesting comments on their proposal. The petitioners have included a showing that there is significant local support for their proposal as well as a substantial gain in the area and population receiving noncommercial educational service from Station WRES-TV. With existing facilities, this station provides Grade B service to 165,181 people in an area of 1,018 square miles, while petitioners indicate the increased facilities will serve 1,396,543 people in an area of 7,029 square miles. While recognizing that this is a large gain and notable benefit, we also request that petitioners supply in comments any additional information concerning the public interest benefits of the proposal, such as areas and populations that will receive first noncommercial educational TV service.

4. In addition, we required, in Docket 85-41, that the noncommercial educational licensee involved in a channel swap must assure the Commission in the rule making that the proceeds of the exchange will be devoted exclusively to activities related to the operation of the noncommercial educational TV station. As the petition does not include that commitment, we request such a statement from the petitioners.

5. Our main areas of concern are the consideration in a rule making proceeding of a specified transmitter site and whether city grade service is provided from that site to Clermont. It is our tentative conclusion that we should consider specific transmitter sites in commercial/educational TV channel swap rule makings, that there are adequate public interest benefits presented by this proposal to merit our consideration of the alternate coverage prediction methods, and that such consideration indicates that the proposed facility would provide city grade service to Clermont.

6. We turn first to the question of whether to consider the particular site petitioners have chosen for the proposed Channel 18 Clermont operation. In the past, the Commission consistently declined to give consideration in rule making proceedings to the characteristics of a designated site. Petitioners ask for such consideration because they believe the use of the site selected for the Channel 18 operation is critical to the success of the commercial station. Also, the petitioners' authorized channel 68 site cannot be utilized for channel 18 operation due to spacing requirements. We believe commercial/educational interband TV channel exchange proceedings are analogous to FM channel upgrades because the petitioner, if successful, will be the only eligible applicant for the allotment. The Commission recently indicated its willingness to consider specific transmitter sites in rule making proceedings where the petitioner would necessarily be the only applicant. *See Woodstock, VA*, 3 FCC Rcd 6512 (1988). While we propose consideration of the specified site, we still are concerned about petitioners' commitment to utilize the designated site, whether it will remain available, and whether other sites in the Bithlo "antenna farm" may be available which could provide better service to Clermont. Petitioners should address these concerns in comments.

7. It further appears that petitioners' determination that the only suitable transmitter site is in the area near Bithlo is based on their judgment that use of a tall tower is essential to a successful operation. Our review of the petition indicates that there is a large area north of Clermont where a transmitter site could be chosen to comply with Commission Rules Sections 73.610, concerning minimum distance requirements, and 73.685(a), concerning city grade coverage. While it appears that a tower in this area would need to be significantly shorter than what petitioners desire, we request petitioners to address the possibility that approval of a particular site or site area may be deferred to the application stage. They should

clearly state whether or not the swap would proceed if we follow our normal course of not considering sites in the rule making.

8. The other major issue arising from this proposal involves acceptance of alternate signal propagation prediction methods to alter results using the standard prediction method. Petitioner argues that consideration of the alternate prediction method results are appropriate in this case because the standard prediction results are clearly in error. While we have not normally considered alternate propagation showings to change predicted city grade coverage, under the circumstances presented by this case, the public interest benefits presented seem to warrant it. Alternate prediction methods tend to be extremely dependent on the exact facilities proposed, making their consideration inappropriate in a rule making context where the transmitter site is routinely not known. However, with our tentative decision to consider this site proposal, we believe it will be useful to set forth our specific city grade coverage concerns in order to develop a complete record.

9. Initially in this regard, we wish to make it clear that we consider our standard propagation curves to be useful administrative tools that have the significant advantages of being relatively simple to use and giving reasonable and repeatable answers. However, they do not always accurately depict actual expected signal levels, a fact recognized by Section 73.684(f) of our Rules, which permits supplemental showings of contour distances as determined by other means under appropriate circumstances. Petitioners used a computer program developed by the National Telecommunications and Information Administration (NTIA) to predict a city grade service contour that extends at least 10 miles beyond Clermont. In addition, they use the terrain roughness correction factor described in Section 73.684(h) through (l) of the Commission's Rules to calculate a city grade contour that just includes all the Clermont city limits, and field strength measurements that, when adjusted for the proposed facilities, range from 75.73 dBu to 99.66 dBu with a median value of 82.35 dBu within the Clermont city limits. Since Section 73.685(a) of the Commission's Rules requires a field strength level of 80 dBu over the entire principal community, they claim that each supplemental method shows city grade service being provided to all of Clermont. We have some concerns with each method, but generally agree that the terrain roughness correction factor is an appropriate supplemental coverage determination method in the situation presented here.

10. The NTIA method yields results that vary significantly from the standard prediction method and from the other two methods presented by the petitioners. In addition, it is fundamentally different from the standard method because it is frequency dependent within the band. As a theoretical matter, the NTIA method may present some improvements over other methods. However, we do not believe that it should be utilized as a tool in UHF TV allotment proceedings at the present time, because it represents a substantial departure from our current prediction methods, a departure we do not believe is justified without substantial further study and analysis.

11. TV field strength measurements, by themselves, are subject to too much variation in results, errors in conversions, and problems with a lack of repeatability to allow them to be routinely accepted to establish contour locations. Calibration and procedural mistakes may not be readily apparent when the measurements are being made, or even when the results are being analyzed. In addition, measurements that are valid for the time they are taken may not be indicative of the median field strength at a site due to time variance of TV (and FM) signals. However, measurements are useful as a supplemental tool in support of other prediction method results.

12. In proposing to accept petitioners' claim that actual city grade service will be provided to Clermont, we rely primarily upon the terrain roughness correction factor, supported by the field strength measurements and based on staff experience, producing a reasonable result. We believe the terrain roughness factor can be a useful supplemental determination method in areas of relatively homogeneous terrain, such as present here. The effective date of the terrain roughness rule has been stayed indefinitely by the Commission because some applications of the procedure produce anomolous results. However, its use seems appropriate here, where (1) the close-in city grade contour is being determined, (2) the terrain is homogeneous, with no elevations at significant departure from average elevation and no apparent "slope" to the ground, and (3) field strength measurements generally confirm the direction and magnitude of the terrain roughness adjustment. In consideration of the terrain roughness factor, we point out that, in the same way as with the standard prediction method, actual service is not ensured to locations within the terrain roughness predicted service contours. While proposing to accept the terrain roughness prediction method, we do request petitioners to provide more details of their calculations in comments. In particular, it is not clear that the terrain profile was developed from United States Geological Survey Topographic quadrangle maps since the profile provided as an exhibit appears to be computer generated. While the computer generated terrain profile is acceptable for determining average terrain elevations for use under the standard prediction method, it is not generally appropriate for depicting terrain profiles for use in calculations where more accuracy is required, such as the terrain roughness correction factor.

13. As requested, we are proposing to modify the permit of Station WCLU-TV, Channel 68, Clermont, Florida, to specify operation on Channel 18 and to modify the license of Station WRES-TV, Channel 18, Cocoa, Florida, to specify operation on Channel 68, in accordance with Section 1.420(h) of the Commission's Rules. We note that the Cocoa station could be operated on the new channel at the existing authorized site while the Clermont station must change transmitter site to meet the channel 18 spacing requirements. The Commission's temporary freeze on TV petitions for rule making and construction permit applications for vacant allotments does not apply because this proposal involves an exchange of allotments, with no net change in the number of allotments in either community and no new allotment becoming available for application. *See Order, 52 FR 28346*, July 29, 1987.

14. In summary, we believe the public interest would be served by proposing the allotment of Channel 18 to Clermont as a substitute commercial channel for Channel 68, and the allotment of Channel *68 to Cocoa, Florida as a noncommercial educational substitute for Channel *18.[1] Accordingly, we seek comments on the proposed amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's rules, for the communities listed below, to read as follows:

City	Channel No. Present	Proposed
Clermont, Florida	68	18-
Cocoa, Florida	*18-, 52	52, *68

15. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

16. Interested parties may file comments on or before **May 15, 1989,** and reply comments on or before **May 30, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Alan C. Campbell, Esq.
Dow, Lohnes & Albertson
1255 23rd Street, N.W.,
Suite 500
Washington, D.C. 20037
(Counsel for Press Television Corporation)

Richard J. Bodorff, Esq.
Carroll John Yung, Esq.
Fisher, Wayland, Cooper & Leader
1255 23rd Street, N.W.,
Suite 800
Washington, D.C. 20037
(Counsel for Brevard Community College)

17. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

18. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is

directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for the proposed Clermont Channel 18 allotment are North Latitude 28-34-51 and West Longitude 81-04-32. The coordinates for the proposed Cocoa Channel 68 allotment are North Latitude 28-21-14 and West Longitude 80-48-57.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-70

In the Matter of

Amendment of Section 73.202(b), RM-6610
Table of Allotments,
FM Broadcast Stations.
(Streator, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 27, 1989; Released: March 23, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Caroline Daugherity (petitioner), requesting the allotment of Channel 291A to Streator, Illinois, as that community's first local FM service. Petitioner submitted information in support of its proposal and states its intention to apply for the channel, if allotted.

2. The Commission believes the proposal warrants consideration. Channel 291A can be allotted to Streator, Illinois, in compliance with the Commission minimum distance separation requirements.[1]

3. In view of the fact that Streator could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments. Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
reator, Illinois	--	291A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 15, 1989,** and reply comments on or before **May 30, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Caroline Daugherity
25 Boys Road
Streator, Illinois 61364
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are 41-07-30 and 88-49-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-69

In the Matter of

Amendment of Section 73.202(b), RM-6303
Table of Allotments,
FM Broadcast Stations.
(Tell City, Indiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 28, 1989; Released: March 23, 1989

By the Deputy Chief, Policy and Rules Division:

1. A petition for rule making has been filed by Michael Hagedorn (petitioner) proposing the allotment of FM Channel 245A to Tell City, Indiana, as that community's first local broadcast service. Additionally, a separate petition was filed by Tell City Radio Company (TCRC), requesting the same channel allotment to Tell City.[1] Thus, we will treat TCRC's petition as comments in support. Both parties have indicated their intent to apply for the channel if allotted.

2. A staff engineering analysis has determined that Channel 245A can be allotted to Tell City, Indiana, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 7.0 kilometers (4.3 miles) northeast[2] to negate a short-spacing to Station WDDJ(FM), Channel 245C1, Paducah, Kentucky. [3]

3. In view of the fact that Tell City could receive a first local broadcast service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Tell City, Indiana	–	245A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 15, 1989,** and reply comments on or before **May 30, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the parties hereto, as follows:

Michael H. Hagedorn
419 Main Street
Tell City, IN 47586

Jerrold D. Miller, Esq.
Miller & Fields, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Counsel for Tell City
Radio Company)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Although TCRC originally requested the allotment of Channel 246A to Tell City, it discovered that channel may not be available due to pending petitions for reconsideration in another proceeding. Thus, it modified its request to consider Channel 245A in lieu of Channel 246A at Tell City.

[2] Reference coordinates at the restricted site are 38-00-10 and 86-43-00.

[3] Reference coordinates at the licensed site of Station WDDJ(FM) are 37-05-55 and 88-37-19.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-72

In the Matter of

Amendment of Section 73.202(b), RM-6520
Table of Allotments,
FM Broadcast Stations.
(Lompoc, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 22, 1989; Released: March 23, 1989

By the Chief, Allocations Branch:

1. A petition for rule making has been filed on behalf of Bob Janecek (petitioner), seeking the allotment of Channel 224A to Lompoc, California, as that community's fourth local FM service.[1] Petitioner states that he will apply for the channel if it is ultimately allotted, as requested.

2. A staff engineering study has determined that Channel 224A can be allotted to Lompoc, California, in conformity with the minimum distance separation requirements specified in Section 73.207(b) of the Commission's Rules.[2]

3. In light of the foregoing, and since the instant proposal could provide an additional local FM broadcast service to Lompoc, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Lompoc, California	262B1, 281B1, 294B1	224A, 262B1, 281B1, 294B1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 15, 1989,** and reply comments on or before **May 30, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

David Tillotson, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Ave., NW
Washington, D.C. 20036-5339

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Although Channel 224A was previously licensed to Station KBOX-FM at Lompoc, Channel 281B1 was ultimately substituted therefor in MM Docket No. 88-384, and the license of Station KBOX-FM modified accordingly. A construction permit has been issued to Station KBOX-FM to operate on Channel 281B1 (File No. BPH-880531ID, granted August 2, 1988).

[2] Reference coordinates utilized for this determination are those of the city reference point at 34-38-24 and 120-27-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-71

In the Matter of

Amendment of Section 73.202(b), RM-6509
Table of Allotments,
FM Broadcast Stations.
(East Porterville, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 22, 1989; Released: March 23, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Central California Broadcasting, permittee of Station KPOR-FM, Channel 263A, East Porterville, California, seeking the substitution of Channel 263B1 for Channel 263A and modification of its permit accordingly, to provide that community with its first wide coverage area FM service.

2. A staff engineering analysis reveals that Channel 263B1 can be substituted for Channel 263A at East Porterville, at the petitioner's specified site,[1] in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

3. In view of the fact that East Porterville could receive its first wide coverage area FM service, the Commission believes it is appropriate to propose modification of petitioner's permit for Station KPOR-FM to specify operation on Channel 263B1, as requested. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we shall not accept other expressions of interest in the use of Channel 263B1 at East Porterville.

4. In view of the above, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
East Porterville, California	263A	263B1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 15, 1989,** and reply comments on or before **May 30, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Jerrold Miller, Esq.
Miller & Fields, P.C.
P.O. Box 33003
Washington, DC 20033

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Reference coordinates at the petitioner's specified site for Channel 263B1 at East Porterville are 35-53-00 and 118-56-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-74

In the Matter of

Amendment of Section 73.202(b), RM-6440
Table of Allotments,
FM Broadcast Stations.
(Bourbon, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 22, 1989; Released: March 23, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Lake Broadcasting, Inc. (petitioner), seeking the allotment of FM Channel 244A to Bourbon, Missouri, as that community's first FM broadcast service. Petitioner provided an engineering study in support of the petition and indicated it would apply for the channel.

2. We believe the petitioner's proposal warrants consideration. Channel 244A can be allotted to Bourbon, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules.[1]

3. In view of the fact that the proposed allotment could provide a first FM broadcast service to Bourbon, Missouri, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Bourbon, Missouri	—	244A

4. IT IS ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice* to the following:

Twenty-one Sounds Communications, Inc.
8422 N. Lindburgh
Steelville, Missouri 63031
(Licensee of Station KNSX-FM, Channel 244A)

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 15, 1989,** and reply comments on or before **May 30, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lake Broadcasting, Inc.
1360 S. Fifth Street
Suite 365
St. Charles, Missouri 63302

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates used for Channel 244A at Bourbon are 38-09-18 and 91-14-30. At these coordinates, Channel 244A would be short spaced to Channel 244A at Steelville, Missouri. However, in MM Docket 87-335, the license for Station KNSX-FM was modified to specify operation on Channel 227C2 in lieu of Channel 244A. *See* 3 FCC Rcd 3073 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-73

In the Matter of

Amendment of Section 73.202(b), RM-6523
Table of Allotments,
FM Broadcast Stations.
(Linden, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 22, 1989; Released: March 23, 1989

By the Chief, Allocations Branch:

1. Linden Radio Joint Venture (petitioner), permittee, Channel 275A, Linden, Alabama (BPH-860707NE), has filed a petition for rule making seeking the substitution of Channel 275C2 for Channel 275A and modification of its permit to specify operation on the higher-powered channel.

2. We believe this proposal is in the public interest, since it could provide an additional expanded coverage FM service to Linden. A staff engineering analysis has verified that Channel 275C2 can be substituted for Channel 275A at Linden in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules provided the transmitter is located at least 23.9 kilometers (14.8 miles) northeast of the community[1] to avoid short-spacing to Station WMSI(FM), Channel 275C, Jackson, Mississippi,[2] as well as to Station WHOD-FM, Jackson, Alabama, Channel 276A. [3] This site also affords protection to the allotment and application for upgraded Station WMBC-FM, Channel 276C2, Columbus, Mississippi.[4]

3. In view of the above, we propose to modify the permit issued to petitioner (BPH-860707NE), as requested, in the event Channel 275C2 is substituted for Channel 275A at Linden, Alabama. Moreover, pursuant to the authority contained in Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 275C2 at Linden.

4. Accordingly, in order to provide Linden with an additional expanded coverage FM service, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Linden, Alabama	253C2,275A	253C2,275C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 15, 1989,** and reply comments on or before **May 30, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Ellis J. Parker
11133 Stephalee Lane
Rockville, MD 20852

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Reference coordinates at the restricted site for proposed Channel 275C2 at Linden are 32-28-03 and 87-37-48. Although petitioner specified a preferred site 25.5 kilometers (15.8 miles) north of Linden at reference coordinates 32-32-02 and 87-45-30, that site is 1.0 kilometer short-spaced to the site restriction placed on Station WMBC-FM, for Channel 276C2, Columbus, Mississippi, at 33-29-48 and 88-31-50 in MM Docket No. 87-324.

[2] Reference coordinates at the licensed site of Station WMSI(FM), Channel 275C, Jackson, Mississippi, are 32-12-46 and 90-22-54.

[3] Reference coordinates at the site specified for Station WHOD-FM, Channel 276A, Jackson, Alabama, are 31-32-38 and 87-52-30.

[4] Reference coordinates at the application site for Station WMBC-FM, Channel 276C2, Columbus, Mississippi, are 33-20-40 and 88-32-47.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-247

In re Applications of

SOUTHLAND BROADCASTING COMPANY, INC.	File No. BPH-870709MG
STEPHEN G. McGOWAN, *et al.*, d/b/a BROADCAST ASSOCIATES	File No. BPH-870710MG
ALBERT E. SMITH	File No. BPH-870710NL
JERRY TOWNSEND	File No. BPH-870710NM

For Construction Permit For A
New FM Station, Channel 273A,
Dothan, Alabama

ORDER

Adopted: March 9, 1989; Released: March 20, 1989

By The Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Before the Review Board is a Motion to Dismiss filed by Southland Broadcasting Company, Inc. (SBC) on February 8, 1989,[1] seeking dismissal of its Petition for Extraordinary Relief (as filed with the Board on January 6, 1989).

2. SBC avers that the captioned parties filed a joint request for Approval of Settlement Agreement with the presiding Administrative Law Judge on January 25, 1989, thus effectively mooting SBC's Petition. Because SBC does not wish to pursue its Petition further, its request for dismissal will be granted.

3. ACCORDINGLY, IT IS ORDERED, That the Motion to Dismiss filed by Southland Broadcasting Company, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTE

[1] SBC erroneously filed its motion with the presiding officer in this proceeding, thus resulting in a significant delay in the resolution of this matter.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-438

In re Applications of

PORT HURON FAMILY RADIO, INC. — File No. BPH-830325AE

L & K BROADCASTING, INC. — File No. BPH-830714AC

For Construction Permit
for a New FM Station
Port Huron, Michigan

Appearances

Morton L. Berfield and *John J. Schauble* on behalf of Port Huron Family Radio, Inc.; *Martin Leader, David D. Oxenford,* and *Jonathan W. Emord* on behalf of L & K Broadcasting, Inc.

DECISION

Adopted: February 28, 1989; Released: March 23, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member ESBENSEN:

1. The captioned applicants (along with four others subsequently dismissed) have elected to enter the comparative hearing ring, there to seek a construction permit for a new FM broadcast station at Port Huron, Michigan. Now before us are the *Initial Decision* of Administrative Law Judge Edward J. Kuhlmann (ALJ), 3 FCC Rcd 5562 (1988)(I.D.), the exceptions of L&K Broadcasting, Inc. (L&K), and the reply thereto filed by Port Huron Family Radio, Inc. (Family). Having reviewed these documents, the transcript and pleadings in the hearing below, and having heard oral argument on January 27, 1989, we affirm the ALJ that L&K is unqualified to be a licensee. On the other hand, we reverse the ALJ with respect to the application of Family, and determine that it also is basically unqualified.

2. These applications were designated for hearing by *Hearing Designation Order*, 51 Fed. Reg. 43786, 1 FCC Rcd 854 (1986) (HDO). In addition to the standard comparative issue (including comparative coverage), the following issues were ultimately considered by the ALJ:

> (1) To determine whether the proposal of Port Huron Family Radio, Inc. would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section.
>
> (2) To determine whether L & K has reasonable assurance that the transmitter site specified will be available to it.
>
> (3)(a) To determine whether Port Huron Family Radio, Inc. gave untruthful answers to the financial qualifications questions in completing Form 301.
>
> (b) To determine whether Port Huron Family Radio is financially qualified.
>
> (c) To determine from the evidence adduced on these issues whether Port Huron Family Radio is qualified to become a broadcast licensee.

3. The ALJ made comparative findings with respect to both applicants (but did not set forth conclusions with respect thereto).[1] However, neither party has submitted exceptions to the comparative findings (including comparative coverage). Additionally, with respect to *Issue (1): Port Huron City Signal Coverage*, neither party has excepted to the ALJ's resolution of this issue in favor of Family. Thus, our review will focus on Issues (2) and (3): L&K's site availability and Family's financial qualifications:

4. *Issue (2); L & K's transmitter site:* On July 14, 1983, L&K filed its application in which it designated an antenna site located at 43 degrees 01' 03" North Latitude, 82 degrees 26' 45" West Longitude. This original site will be referred to as "Site A." L&K's proposed tower was to be 365 feet above ground, guyed, the erection of which would require four to five acres of land (Family Exhs. 10, 13; Tr. 275, 289-91). Some two years later, on November 26, 1985 (before designation of the applications for hearing, but long after the "B" cut-off date of January 9, 1984 had passed, *see HDO*, 1 FCC Rcd at 860, n. 2), L&K filed an amendment to its application to propose a new transmitter site (hereinafter "Site B," the geographic coordinates of which were 43 degrees 02' 51" North Latitude, 82 degrees 27' 32" West Longitude). The filing of the amendment for Site B included the statement of Kenneth A. Monicatti, an officer and 30% stock subscriber in L&K, dated November 11, 1985, purporting to establish "good cause" for L&K's amendment. Monicatti declared (emphasis added):

> When the [L&K] application was filed with the Commission, I [Kenneth A. Monicatti] was not sufficiently informed on what was the "reasonable assurance" standard in selecting and obtaining a transmitter site location. At that time, our consulting engineering advised us what would be a suitable location for the location of the transmitter site. Thereafter, I visited those areas to determine the availability of a site. *When I visited those areas, I noticed that there were " For Sale " signs on much of the property. Therefore, I concluded that the original site specified would be available for purposes of erecting a transmitter tower. Approximately 90 days ago during a conversation with our counsel, it came to my attention that I did not have the requisite reasonable assurance.* Therefore, I undertook to obtain that assurance and found out that I could not rely on the original site that I had selected. Consequently, I

obtained a new transmitter site, as depicted in the attached engineering amendment. I believe that the above demonstrates good cause for permitting L&K Broadcasting, Inc. to amend its application.

5. Monicatti later conceded that, between August and November 1985, he "discovered that the property did not seem to be for sale any longer" (L&K Exh. 6, at 4). When examined about his declaration at hearing, Monicatti admitted that he had not reached that latter conclusion by contacting the land owner; in fact, he did not know, in November 1985, *who* owned the land. But, Monicatti claims he noticed, *mirabile dictu*, that condominiums were being constructed on the site, which wilted his proposed tower construction potential (Tr. 282).

6. The Mass Media Bureau, upon designation of the applications for comparative hearing, held that L&K's Site B amendment was unacceptable for filing and returned its amendment forthwith. In so doing, the Bureau noted (*HDO*, 1 FCC Rcd at 859):

> On November 26, 1985, L&K filed an amendment to change transmitter site because "the site originally specified by the applicant was specified without obtaining reasonable assurance as that concept is now defined by the Commission. While the site was available for sale at the time the L&K application was filed, L&K's principals did not obtain any formal assurance from the land owner that the site could be specified as proposed transmitter site in an FCC application." L&K has submitted the November 26, 1985 new transmitter site amendment as an attempt to resolve all questions of reasonable assurance of site availability. L&K contends that good cause exists for acceptance of the amendment as it would be in the public interest to provide the Commission with a greater choice among applicants . . . . L&K, having admitted that the site specified in its initial application was never "reasonably available" to it, has thus failed to provide a good cause showing as required under 47 C.F.R. §73.3522(b) for accepting this amendment long after the "B" cut-off date.

7. On December 23, 1986, L&K filed with the ALJ a Petition for Leave to Amend, again attempting to move its tower and transmitter to Site B. That petition contained the same November 11, 1985 statement of Monicatti found fatuous by the Bureau in L&K's prior amendment attempt. The ALJ denied the Petition by *Memorandum Opinion and Order*, FCC 87M-118, released January 16, 1987, noting that "L&K has been foreclosed from amending because it depicted a site which it had not been assured would be available and that fact gave rise to [the] site availability issue".

8. At the time, L&K also had pending before the Chief Administrative Law Judge a Petition for Leave to File Application for Review of the HDO (filed December 4, 1986),[2] essentially claiming that the Bureau had erred in rejecting L&K's Site B amendment. Therein, L&K averred (at para. 1; emphases added):

> Although the original [L&K] site was available *for sale* at the time L&K's application was filed, *L & K did not obtain formal assurance from the site's owner* that it could be specified as a proposed transmitter site for L&K's application. At that time, *L & K believed that the fact that the land was for sale was sufficient to provide " reasonable assurance "* of its availability as a transmitter site. However, after a conversation with counsel, L&K realized that this arrangement might constitute a problem.

9. Additionally, on January 5, 1987, Family filed a Petition to Enlarge Issues against L&K seeking, *inter alia*, a misrepresentation issue concerning L&K's original antenna site certification. In response (L&K Opposition to Petition to Enlarge Issues, filed January 21, 1987, para. 1; emphases added), L&K admitted that its Site A "was specified by L&K *without* 'reasonable assurance' of its availability having been obtained. Although the original site was available *for sale* at the time that L&K's application was filed, L&K *did not obtain formal assurance* from the site's owner . . . . At that time, L&K believed that the fact that the land was *for sale* was sufficient . . . ."

10. Despite L&K's consistent representations made between 1985 and 1987 that it had improperly assumed "reasonable assurance" for Site A solely as a result of the "For Sale" sign on the property, Monicatti later submitted (on April 16, 1987) a statement with L&K's direct written case exhibits, which there claimed *for the first time* that Monicatti had "[f]rom the for sale signs on the one parcel which appeared to be suitable for tower construction, obtained the name of Wynn Cooper, a local real estate agent" (L&K Exh. 6, at para. 1). As a result, Monicatti asserted that he had "visited" with Cooper on two occasions, during which time Cooper confirmed that nine acres of land could be purchased or leased, and was quoted a price of approximately36.000 per acre for the "4-5 acres" which Monciatti believed were "necessary" for his purposes (L&K Exh. 6, para. 3). In that same document, Monicatti further claimed that when he was instructed by his counsel to research the background of the competing applicants in this proceeding "to determine if there were any grounds to seek enlargement of issues," including the availability of the *other* applicants' proposed transmitter sites, he "became concerned because I had never spoken to the landowner of the property L&K specified. I told counsel that I had relied merely on indications that the property was for sale and did not have any specific assurances that it would be made available to L&K" (L&K Exh. 6, at paras. 6-7). However, Monciatti, *again for the first time*, there alleged that he did not "recall the specifics of my conversations from two years earlier with Mr. Cooper . . . . I thought those conversations were unimportant . . . ." (*id.*, at para. 7).

11. However, just 12 days later when Monicatti testified at hearing, his story colored. Whereas his original declaration had averred that he had obtained Cooper's name solely from the "for sale" sign on the property (*id.*, para. 1), upon cross-examination he now claimed: "I received the name of Mr. Cooper from Judy Galentae who was a real estate person who I knew in St. Claire, Michigan. I had asked her if she knew anything about the property, and she said, 'Well, that's Wynn Cooper's.'" (Tr. 264). Monicatti also conceded that he took no measures whatever to buy or lease Site A. He did not contact the owner, and he did not ask Cooper to do so for him (Tr. 265-70). Additionally, Monicatti alleged that he not reveal his dis-

cussions with Cooper in his numerous prior declarations to the Commission, because he "forgot" about such discussions (Tr. 288).

12. In addition to his eve-of-hearing recollection of his purported conversations with Cooper in 1983, Monicatti also averred (L&K Exh. 6) that he had "again" spoken with Cooper just prior to hearing and that, *inter alia*, Cooper had indicated that "part" of the original Site A "was and had been available for lease" (*id.*, at para. 9). Monicatti further asserted that he had met with the actual landowner, Martin E. Weiss, prior to submitting L&K's written testimony, and that they had executed an option agreement giving L&K "a 90-day option to lease *the original* transmitter site . . . ." Thus, L&K unequivocally represented that it possessed "continued reasonable assurance *of the transmitter site specified in its application*" (*Id.*, emphasis added). Monicatti stated on the record that the subject option *pertained to the same site* (Site A) specified in L&K's original application (Tr. 161, 286).

13. However, John C. Niederhauser, a Registered Land Surveyor, declared that the Site A coordinates specified in L&K's application were located where condominiums now stand, and that the "optioned site" is *actually* a nearby strip of land, 100 feet by 450 feet, which is bounded on the east and west by office buildings, on the north by the new condominiums, and on the south by a public street (Family Exh. 13). Niederhauser explained that the center point of L&K's "optioned area" would have the geographic coordinates of 43 degrees 01' 00" North Latitude, 82 degrees 26' 46" West Longitude. (For convenience, this third set of coordinates shall be referred to as "Site C"). When faced with Niederhauser's report, Monicatti conceded that Site C was *not* the site on which he *originally* intended to erect the L&K tower; Site A, he agreed, was now occupied by condominiums (Tr. 290-93). Moreover, Monciatti admitted that Site C was *not* the five acres he originally desired, but only one acre, and that the office buildings adjacent to Site C had existed in 1983. He further admitted to never asking L&K's consulting engineering whether the coordinates had changed, nor did he inquire as to whether Site C was suitable for the proposed L&K tower (Tr. 296-300). In light of the surveyor's affidavit, and of Monicatti's admissions, the ALJ found that Monicatti was evasive about whether his hearing site proposal (Site C) was different. The ALJ also found that Monicatti, when confronted with this conflict, was evasive as well about what he originally told L&K's engineer about where L&K's tower could be located (Tr. 272-273).

14. At hearing, and in spite of Monicatti's declaration that during his initial contact with Cooper, he indicated that L&K needed only "4-5 acres" (L&K Exh. 6, para. 3), Monicatti attempted to convince the ALJ that he *actually* intended to designate a space much larger than the original Site A, and that he now intended to locate the tower on another portion of the "same" area (which, it turns out, is Site C). But, admitted into evidence at hearing was Family Exhibit 10, a plat of the various parcels of relevant land. When Monicatti was questioned at hearing about the preparation of the plat map, the following colloquy ensued (Tr. 272):

> [FAMILY COUNSEL]: . . . I notice on the map there is a plot of land that has an X mark on it. It has . . . a note that it is 9.23 acres, and [an] X mark. Did you put that X mark on there?
>
> [MONICATTI]: I believe I did.
>
> [FAMILY COUNSEL]: Was that to indicate where your original site . . . is?
>
> [MONICATTI]: That's correct.

Monicatti swore that he had sent that plat to his consulting engineer (Harold Munn) for preparation of L&K's engineering exhibit. The subject plat bore two "X" marks in two narrow parcels of land (including what was to become Site C) (Tr. 272). However, the testimony continued (Tr. 273):

> [FAMILY COUNSEL]: . . . I want to make sure I understand that your original site is back where the 9.23 acres is; is that correct?
>
> [MONICATTI]: I do not recall exactly what I told Mr. Munn at the time. I told him that it was in this plot, and I don't recall the conversation exactly where it was on the property.
>
> [FAMILY COUNSEL]: Well, did you tell Mr. Munn that . . . there was four or five acres available?
>
> [MONICATTI]: Yes.
>
> [FAMILY COUNSEL]: So, the four or five acres to be available would be in the back where the 9.23 acres is, would it not?
>
> [MONICATTI]: Yes.

15. L&K submitted a copy of the 90-day option to lease Site C (L&K Exh. 6); however, that option has not been renewed; indeed, it is undisputed that even Site C is no longer available. More importantly, Monicatti admits that he never confirmed that Site C, located between two office buildings, would be suitable, in fact, for the proposed tower (or whether L&K's proposal was consistent with existing land use requirements).[3] When it became apparent during questioning that Site C could not accommodate the guy wires L&K had previously proposed to support the tower, Monicatti replied that guy wires were *no longer* part of L&K's proposal. L&K now proposed, he maintained, that the tower be self-supporting (Tr. 294-295). Because Site C is no longer available to L&K (L&K Section 1.65 Amendment, filed January 7, 1988), L&K lately proposes *to return* to Site B (L&K Petition for Leave to Amend, filed January 15, 1988).

16. *Discussion:* As we recently reiterated in *62 Broadcasting, Inc.*, FCC 89R-4, released February 17, 1989, an applicant seeking a new broadcast facility must, in good faith, possess "reasonable assurance" of a transmitter site at the time it files its application. And, the Commission itself declared in its *Order* (*In the Matter of Amendment of Sections 73. 3572 and 73. 3573 Relating to Processing of FM and TV Broadcast Applications*), 58 RR 2d 776, 782 (1985)(emphases added; footnote omitted):

> The Commission has held that although an applicant need not necessarily go as far as to demonstrate absolute assurance, an applicant should be able to show some reasonable assurance that the site for each proposed transmitting antenna is available. *A mere possibility that a site will be available is not sufficient. William F. Wallace and Anne K. Wallace*, 49 FCC 2d 1424 (Rev. Bd. 1974). *Commission requirements will be satisfied when an applicant has contacted the property owner or owner's agent and has obtained reasonable assurance in good faith that the proposed site will be available for the intended purpose.*

While some latitude is afforded such "reasonable assurance" (*e.g.*, the applicant need not necessarily own the proposed site, and may even work out the final details for lease/ownership at sometime in the future, *see National Innovative Programming Network, Inc.*, 2 FCC Rcd 5641 (1987)), the Commission's basic "reasonable assurance" standard remains unaltered. *Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985); *Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027 (Rev. Bd. 1983), *rev. denied*, FCC 84-119, released April 2, 1984, *aff'd mem. sub nom. Royce International Broadcasting Co. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985)(table), *cert. denied*, 474 U.S. 995 (1985); *62 Broadcasting, Inc., supra*, at para. 22.

17. The Bureau rejected and returned L&K's initial proposed amendment to Site B, and we hold that the ALJ correctly refused to allow L&K to amend to that site. It is clear that "where a cutoff period is established, applications must be submitted in substantially complete form before the cut-off date to be entitled to comparative consideration." *Advance, Inc., et al.*, 88 FCC 2d 100, 107 (1981), *recon. denied*, 89 FCC 2d 177 (1982). *Accord Colorado Television, Inc.*, 98 FCC 2d 513, 515 (Rev. Bd. 1984), *rev. denied*, FCC 85-437 (released August 6, 1985), *aff'd by judgment*, 801 F.2d 1436 (D.C. Cir. 1986). "Past and recent Commission precedent establish that an applicant must have reasonable assurance that its transmitter site is available at the time its application is either filed or amended." *George Edward Gunter*, 104 FCC 2d 1363, 1364 (Rev. Bd. 1986)(quoting *Alden Communications Corp.*, 59 RR 2d 259 (Rev.Bd. 1985)). L&K's multiple admissions that it had no understanding with, or good faith "reasonable assurance" from, the landowner (or the owner's agent) of its initial site:

> establishes that it is not a basically qualified applicant . . . since the law is clear that 'an applicant will not be permitted to amend where it did not have the requisite reasonable assurance to begin with . . . '" *South Florida Broadcasting Co.*, 99 FCC 2d 840, 845 n. 12 (Rev. Bd. 1984).

Classic Vision, Inc., 104 FCC 2d 1271, 1273 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 2376 (1987); *see also 62 Broadcasting, Inc., supra*, at para. 26.

18. With respect to L&K's eve-of-hearing recollections of conversations with the landowner's agent, Wynn Cooper, we defer to the ALJ's determination of incredibility. Such claims are unsubstantiated, and of particular import is the absence of corroboration at hearing from the agent, Cooper. It is fundamental that:

> The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party.

2 *Wigmore On Evidence* §285 (1940); *see also McCormick on Evidence* §272 (1984)(espousing the "classic" statement of the law to be that "if a party has it peculiarly in its power to produce witnesses whose testimony would eludicate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable"), quoted in *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3953 (Rev. Bd.), *recon. denied*, 3 FCC Rcd 5631 (Rev. Bd. 1988). In sum, we affirm the ALJ's conclusion that Monicatti's claim that he had met the "reasonable assurance" test in 1983, through contact and discussions with agent Cooper, is unsupported and unbelievable. We also agree that Monicatti's claim that he had met on two occasions (in 1983) with Cooper, but "forgot" these meetings for three years, is equally incredible. There is no supporting evidence whatsoever in the record to substantiate that claim.[4] Nor will we disturb the ALJ's conclusion that Kenneth Monicatti "exhibited demeanor which indicates that he cannot be relied on to answer truthfully" (I.D., at para. 39). Commission precedent requires that credibility findings of an ALJ be given decisional deference, unless those findings are in irreconcilable conflict with the record evidence. *Opal Chadwell*, 2 FCC Rcd 5502, 5504 (Rev. Bd. 1987), *remanded on other grounds*, FCC 89-7, released January 31, 1989; *see also TeleSTAR, Inc.*, 2 FCC Rcd 5, 17 (Rev. Bd. 1987), *remanded*, 2 FCC Rcd 7352 (1987)(subsequent history omitted); *Broadcast Associates of Colorado*, 104 FCC 2d 1619 (1986)(*modifying* 100 FCC 2d 616 (Rev. Bd. 1985))("absent extrinsic evidence to the contrary, we believe that [an] ALJ's judgment . . . is entitled to great weight"); *Signal Ministries, Inc.*, 104 FCC 2d 1481, 1486 (Rev. Bd. 1986)("in the absence of patent conflicts with the record evidence, the Commission accords special deference to [an ALJ's] credibility findings since the trier of fact has a superior opportunity to observe and evaluate a witness's demeanor and to judge his/her credibility"). Thus, some real and legally recognizable deference is to be accorded credibility findings of an ALJ unless "reversal is supported by substantial record evidence." *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1141 (D.C. Cir. 1985).

19. Here, by its own admissions, L&K never secured "reasonable assurance" of the site specified in its application. Ergo, L&K's subsequent attempts to amend to various different sites were properly rejected. Issue 2 was correctly resolved against L&K; and, as a result, L&K is not qualified to be a Commission licensee.

20. *Issue 3: Family's Financial Qualifications:* Based upon hearing testimony elicited during the first phase of the proceeding below, L&K petitioned the ALJ to add financial qualifications issues against Family and to reopen the record. In acceding, the ALJ opined (*Memorandum Opinion and Order*, FCC 87M-2022, released August 27, 1987):

> [Family] does not appear to claim that its financial plans for FM Channel 272A have been documented; instead, it argues that its estimate of costs, which is unwritten and apparently without detail, and its loan from George Clark [a friend of Doorn's] are undocumented because it is unnecessary. [Family] gives no credible answer about how it determined the amount of money it would need and it concedes that the loan from Mr. Clark is unwritten and without specificity as to the principal amount, repayment requirements, or interest. None of the [Family] principals have examined the lender's financial status. [Family] has no assets, all of its expenses are met by the lender when they arise. These circumstances give rise to the conclusion that the applicant has proceeded in the most informal, unbusinesslike manner imaginable when it is considered that all the money needed to finance the application and construction is to be provided by someone who has no interest in [Family].
>
> Mr. Clark may be wealthy and reliable, as [Family] claims, but there is no objective way to substantiate that claim and that is precisely what the Commission is required to do under the Communications Act before it can issue a construction permit. The Form 301 application instructs applicants to document their ability to construct and operate. Included in that determination is the requirement that a lender, if it is not a financial institution, must have sufficient net liquid assets to meet the applicant's financial commitments. [Family] did not formalize its plans and it evidently did not review Mr. Clark's balance sheet, let alone the liquidity of his assets. It appears that [Family] does not even know how much money will be needed and it has not undertaken to document that the money needed will be available to construct and operate the station. This failure to meet the financial requirements in any respect gives rise to the possibility that [Family] is unreliable and that it answered Form 301, Section III, Questions 1 and 2 untruthfully. An appropriate financial issue will be designated.

21. Initially, in opposition to L&K's petition to enlarge issues, Family submitted a declaration of Martin Doorn which averred: "Prior to the certification [of FCC Form 301], I was aware of the costs of constructing the proposed station and of monthly operating costs. I had been assured by George Clark that he would make the necessary funds available, and I was familiar with Mr. Clark's finances . . . ." (Family Opposition to Motion to Enlarge Issues, filed May 28, 1987, Attachment 1). As it later developed at hearing, Doorn claims to have asked Roger Gardner, George Clark's accountant, in early 1983, to develop cost figures for the construction and the first three months of operation of Family's proposed facility (Family Exh. 14, at 2; Exh. 15, at 2).[3] Gardner estimated that Family would need168,867, and he further approximated that30,000 would be additionally needed to prosecute the application, bringing the necessary total to 200,000 (Family Exh. 14, at 2-4). Family, in turn, claims to have relied exclusively on George Clark to provide its financing (*id.*, at 2-3; Family Exh. 16, at 2; Tr. 497-498, 514).

22. Doorn, minister of the Northgate Bible Church, alleged that Clark has "financed" many projects for that church. Within the year prior to hearing, Clark had donated30,000 to the church (Family Exh. 14, at 3; Exh. 16, at 2; Tr. 496). Clark also allegedly told Doorn that he would help him financially in the future (Family Exh. 16, at 2; Tr. 498). Before certifying to the Commission that Family was financially qualified, Doorn claims to have asked Clark to furnish the200,000, and Clark purportedly requested repayment *only if* Family received a grant and operated the proposed station. Clark said he foreswore interest and collateral, and because of Doorn's longtime friendship with Clark, this loan agreement was merely oral (Family Exh. 14, at 3-4; Exh. 16, at 2-3; Tr. 501, 506, 512). Clark further claimed that he frequently commits large sums of money upon oral affirmation (Tr. 458-59, 462-464).

23. The record is uncontroverted that, when Doorn certified Family's financial qualifications, Family had no formal written agreement with Clark (or anyone else)to provide the necessary funds for construction and operation, and that Doorn's reliance upon Clark's unrestricted beneficence was based solely on (1) Clark's past solicitude towards Doorn (though never to the extent contemplated here)(Tr. 595-596); and (2) accountant Gardner's belief that Clark had sufficient resources to extend the 200,000 interest-free loan. However, the record demonstrates that Gardner's own assurances to Doorn were less than well-founded. Upon cross examination, Doorn allowed (Tr. 599-600; emphases added):

> [L&K COUNSEL]: I take it from your written testimony that Mr. Gardner told you that he believed it was appropriate to execute the certification?
>
> [DOORN]: Yes, he did.
>
> [L&K COUNSEL]: Did you ask Mr. Gardner what was his underlying basis for that advice?
>
> [DOORN]: He was his bookkeeper, and he had knowledge, and he felt that I was within correct parameters to sign that statement.
>
> [L&K COUNSEL]: And did you give Mr. Gardner a copy of the FCC instructions regarding the application?
>
> [DOORN]: Yes, he saw them. I read them with him.
>
> [L&K COUNSEL]: Just to be clear, *did you give him a separate set of instructions for Form 301, or did you just actually give him the form itself?*
>
> [DOORN]: *We went over the form itself.*
>
> [L&K COUNSEL]: The form itself. Did you do any research of your own other than --
>
> [JUDGE KUHLMANN]: Wait just a second. When you say you went over the form itself, would you include within that the instructions to the form?
>
> [DOORN]: Whatever was with it.

[JUDGE KUHLMANN]: Well, were there any instructions with the form?

[DOORN]: *I'm sorry, I just don't know.*

[JUDGE KUHLMANN]: Have you ever seen any separate instructions for Form 301?

[DOORN]: *I don't know.* I can't remember what I had and didn't have back in 1983. I honestly can't remember.

For his part, Gardner could not recall reviewing the actual instructions to FCC Form 301 to elicit the Commission's definition of "net liquid assets" (Tr. 578):

[L&K COUNSEL]: Did you know what the term "net liquid assets" meant to the FCC?

[GARDNER]: I've been public accounting since 1968. I had a pretty good idea what net liquid assets were.

[L&K COUNSEL]: Did you create a sheet of paper which listed what his net liquid assets were?

[GARDNER]: Did I create one?

[L&K COUNSEL]: Yes.

[GARDNER]: No.

[L&K COUNSEL]: Did you have a piece of paper in 1983 that showed that?

[GARDNER]: If I did, I don't recall it, but it's very possible.

To the ALJ, Gardner elaborated (Tr. 589; emphasis added):

[JUDGE KUHLMANN]: . . . in 1983 when you made some sort of a determination about the assets that Mr. Clark had, what did you do with that information? Did you tell Mr. Doorn about that?

[GARDNER]: Yes, I did.

[JUDGE KUHLMANN]: You did. And what did you tell him?

[GARDNER]: When it came to me -- the information on the cost of the thing came to me because I did it. I reported that to Mr. Doorn. Mr. Doorn asked me, since had had basically at that point in time had some commitment from Mr.Clark, and he knew I was doing Mr.Clark's work and we were all relatively good friends, he asked me specifically, is it okay for me to X this box, this net liquid assets, the certification box, and *I said, based on what I know of Mr. Clark and how quickly he can raise that kind of money that we need, he could X that box without any problems*, as far as I could see.

24. Gardner's hearing testimony is bereft of any suggestion that he had personally and carefully reviewed contemporaneous financial statements of Clark; or more particularly, Clark's net liquid assets. Gardner merely evinced his belief that Clark could " *raise that kind of money*."[6] Moreover, Clark's 1983 financial statements were not submitted into evidence, since Clark maintained that all of his financial records prior to 1985 had been totally destroyed in a "basement flood." L&K had attempted, through discovery, to obtain these documents; however, the following testimony describes the results (Tr. 435-436):

[L&K COUNSEL]: Okay. Let me go on to Item No. B [of the discovery request]. It called for any and all documents evidencing the amount of net worth -- excuse me -- net liquid assets that you had, including but not limited to, bank statements, personal financial statements and personal balance sheets as of March 23, 1983. Now, did you provide all those documents?

[CLARK]: Any records that I had prior to '85 -- I should back up. I got a new secretary in '85 and, before that time, my wife kept the records, and they were left in my basement, and the basement flooded, and they got mildewed and all the documents were destroyed prior to '85, anything personally that I had.

[L&K COUNSEL]: So, as of this date, no personal financial statement or balance sheet exists for the period in early 1983?

[CLARK]: Not to my knowledge.

[L&K COUNSEL]: And up through sometime in 1985, there would be no such documents?

[CLARK]: Not that I could find.

25. *Discussion:* The record reflects that Doorn (who had personally certified Family's financial qualifications) is said to have asked George Clark to provide200,000 to finance Family's application, and Clark purportedly assented to providing a200,000 interest-free loan, uncollateralized, to be repaid *only if* Family received a grant and operated the station. In turn, Doorn's sole basis for assuming Clark's underlying financial ability was accountant Gardner, who merely expressed his "belief" to Doorn that Clark could raise adequate resources to fully finance the Family proposal.

26. However, as between themselves, Clark and Doorn never agreed to terms for any such loan (Tr. 39, 36), and never discussed such critical matters as security for the loan or any repayment period (Tr. 40). Furthermore, when Doorn certified Family's financial qualifications, no Family principal had in his possession, or had carefully reviewed, tangible evidence in support of Clark's reputed assets (L&K Exh. 9 at 6, 13). Thus, other than his friend-

ship with Clark, Doorn's assumption that Clark had sufficient resources was predicated entirely on a brief conversation with Clark's accountant, Roger Gardner, who testified that he had merely considered Clark's current cash, his business accounts receivable, the equipment his business owned, and Clark's personal residences. Based thereon, Gardner speculated that Clark "could raise that kind of money".

27. L&K's exceptions to Family's financial certification are well-taken. Doorn's certification to Family's financial ability was based not upon evidence or personal affirmation that Clark's charitable oral pledge was capable of effectuation, nor upon the documented existence of Clark's net liquid assets. It was based solely on heresay and, allegedly, unbridled faith that Clark would tender an unencumbered200,000 when requested. Thus, as shown below, the ALJ erred by concluding that Clark's oral pledge and casual committment was sufficient to satisfy the Commission's financial certification requirements.

28. Consistent Commission policy and precedent demand that a proposed lender, *if not a recognized financial institution*, must evidence net liquid assets sufficient to meet an applicant's financial commitment. Additionally, the certifying applicant must review documentation establishing these net liquid assets, *before certification*. As we traced in *Las Americas Communications, Inc.*, 1 FCC Rcd 786, 788 (Rev. Bd. 1986)(emphasis added):

> Earlier versions of Section III of Form 301 required the submission of copies of all loan agreements with banks or individuals (setting forth loan amount, interest rate, terms of repayment, and security, if any) and the submission of balance sheets or financial statements for each person or entity except financial institutions that had agreed to furnish funds, showing all liabilities and containing current and liquid assets sufficient in amount to meet current liabilities and to satisfy the proposed broadcast commitments. *E.g.*, FCC Form 301, Section III, p. 3, October 1981 ed. As indicated, *supra*, present Form 301 continues to require written documentation to support "reasonable assurance" of funds. FCC Form 301, Section, III, Instruction C, January 1982 ed. The only change is that now the documentation need not be *submitted* in the application process unless requested by the Commission . . . . The law is and remains that loan agreements and bank commitment letters must be prepared and must be sufficiently specific and complete to furnish reasonable assurance of the availability of the loans. *Jay Sadow*, 39 FCC 2d 808, 810, 26 RR 2d 1032, 1035 (Rev. Bd. 1973). *Similarly, where individuals are providing funds, they must also support their undertakings with balance sheets or financial statements. United Broadcasting Co.*, 93 FCC 2d 482, 509, 53 RR 2d 57, 81 (1983). This is so even though there is a presumption that "ownership of nonliquid assets several times the value of the cash which such assets are relied upon to yield" provides reasonable assurance of the ability to secure the required funds. *International Broadcasting Co.*, 3 FCC 2d 449, 451, 7 RR 2d 302, 305 (196); *Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 706, 51 RR 2d 389, 391 (Rev. Bd. 1982).

Indeed, the Commission's instructions to FCC Form 301 are unambiguous (FCC Form 301, Instructions, Section III):

> An applicant for a new station must certify that it has sufficient net liquid assets on hand or committed sources of funds to construct the proposed facility and operate for three months, without revenue. In so certifying, the applicant is also attesting that it can and will meet all contractural requirements, if any, as to collateral, guarantees, and capital investments. As used in Section III, "net liquid assets" means the lesser amount of the net current assets shown on a party's balance sheet, with net current assets being the excess of current assets over current liabilities.

These instructions also expressly provide that, although documentation supporting the "certification of financial qualifications need not be submitted with this application, [such documentation] must be available to the Commission upon request." The averments required (by Questions 1 and 2 in Section III, FCC Form 301) are similarly specific:

> 1. The applicant certifies that sufficient net liquid assets are on hand or are available from comitted sources to construct and operate the requested facilities for three months without revenue.
>
> 2. The applicant certifies that: (a) it has a reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock by parties to the application, each loan by banks, financial institutions or others, and each purchase of equipment on credit; (b) it can and will meet all contractural requirements as to collateral, guarantees, and capital investment; (c) it has determined that a reasonable assurance exists that all such sources (*excluding banks, financial institutions, and equipment manufacturers)* have sufficient net liquid assets to meet these commitments.

Here, Doorn affirmatively so attested when certifying Family's application on March 23, 1983. However, when called upon, Family could produce no documentation demonstrating Clark's net liquid assets at the time of certification, and Doorn had never reviewed such documentation in the first instance. Instead, he relied upon hearsay.

29. The Commission no longer requires the actual filing of financial documentation; however, as we have demonstrated, it expressly requires applicants to possess such documentation when certifying. *Public Notice on Random Verification of Financial Certifications*, 2 FCC Rcd 2122 (1987); *Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985); *South Florida Broadcasting Co., Inc.*, 94 FCC 2d 452 (1983)("we are not, in any way, modifying the underlying substantive financial criteria . . ."); *Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 50 RR 2d 381, 382 (1981)("Documentation supporting the attestation of financial qualification need not be submitted with the application but must be available to the Commission upon request").

30. In *Tulsa Broadcasting Group*, 2 FCC Rcd 6124, 6125 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 4541 (1988), the Board confronted a contention that *Las Americas* was erroneous in that the Commission's certification standard required nothing more than a "reasonable good faith reliance on the word of a person in a position to know that which he or she represents to be true," and that the *Public Notice on Random Verification of Financial Certifications*, *supra*, relieves an applicant from preparing or possessing such documentation. We rejected this argument, and held (2 FCC Rcd at 6126):

> In regard to the written documentation requirements, enunciated in *Las Americas Communications, Inc.*, . . . it is clear that the . . . *Public Notice* [on Random Verification of Financial Certifications] provides no support for eliminating that requirement. Rather, the *Public Notice* simply stated (as one of the justifications for the certification requirement) that applicants need not submit detailed supporting documentation demonstrating their financial qualifications. Further, the Commission declared and emphasized "that it was not, in any way, modifying the basic substantive financial requirement," . . . and that it would, in the future, initiate a program of random checks of the financial qualifications of applicants, directing selected applicants to submit the *documentation and information supporting their certifications*. The *Public Notice* does not, in any respect, undermine or conflict with *Las Americas Communications, Inc* . . .

31. Notwithstanding, Family argues that *Armando Garcia*, 3 FCC Rcd 1065 (Rev. Bd. 1988), *review denied*, 3 FCC Rcd 4767 (1988), demonstrates that the absence of supporting documentation is not fatal. Family's reliance on *Garcia* is misplaced. There, among other things, the individual applicant received appropriate documentation of salient available funds "well before the filing of Garcia's application," and had reaffirmed the availability of equipment leases. 3 FCC Rcd at 1066. Similarly, Family can find no succor in *Northampton Media Associates*, 3 FCC Rcd 5164 (Rev. Bd. 1988), where an applicant corporation, whose 80% owners were husband and wife, relied upon their own substantial personal funds. While their corporation's application was certified by a non-family minority (20%) shareholder, we determined: (1) that all three corporate principals had been active in the application preparation and process, and "the two [husband and wife] who were intimately familiar with the proposed sources of funding for the applicant, took an active role in preparing and reviewing the accuracy of the application, and the certification was affixed under [their] expess authority and direction"; (2) that they were relying on their own substantial personal resources that they had reviewed prior to filing (rather than on a beneficent acquaintance, such as Family's George Clark); and, (3) that all three *Northampton* principals had personally reviewed the application prior to filing, thereby ratifying the financial certification. *See id.*, 3 FCC Rcd at 5168.

32. In spite of reliance on financial certification, the Commission (and the Review Board) continue to expect supporting documentation, when and if required, to confirm an applicant's certification. *E.g.*, *Opal Chadwell*, 2 FCC Rcd 2981 (Rev. Bd. 1987)(Board requests additional financial data), 2 FCC Rcd 5502 (Rev. Bd. 1987)(Board finds applicant financially qualified), *Order* FCC 88I-045, released May 5, 1988 (Commission requests additional financial data from same applicant), *Memorandum Opinion and Order*, FCC 89-7, released January 31, 1989 (Commission remands proceeding to ALJ for additional evidentiary hearing on financial issue). As the Commission recently reaffirmed, and so advised the Court in its Brief for Appellee in *Christian Children's Network v. FCC*, Case No. 88-1012, U.S. App. D.C., at p. 19:

> "Under Commission policy well established . . . it was not enough for an applicant simply to believe that it would be financially qualified by the time it obtained a construction permit [*citing Dutchess Communication Corp., supra*]. The Commission required that an applicant demonstrate a reasonable assurance of the availability of sufficient capital to build and initially operate the station."

Additionally, as similarly explained in *Washoe Shoshone Broadcasting*, *supra*, 3 FCC Rcd at 3959:

> The Commission's current application form (FCC Form 301) requires every applicant to certify, *under penalty of perjury*, that, "sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenue." FCC Form 301, Section III. Each applicant must swear that (a) "it has a reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock by parties to the application, each loan by banks, financial institutions or others, and each purchase of equipment on credit"; (b) "it can and will meet all contractural requirements as to collateral, guarantees, and capital investment"; and that (c) "it has determined that a reasonable assurance exists that all sources (excluding banks, financial institutions, and equipment manufacturers) have sufficient net liquid assets to meet these commitments."

And, as echoed again in *Religious Broadcasting Network*, 3 FCC Rcd 4085, 4093 (Rev. Bd. 1988), an applicant:

> may not for certification purposes rely simply upon the undocumented assurances of [another] that all of the necessary finances will be forthcoming, without acquiring firsthand knowledge of the sufficiency of the assets upon which their personal certification is based . . . . To permit such principals to certify to their financial resources on nothing but the undocumented assurances of other [individuals] would be to negate entirely the efficacy of the sworn certification itself.

See generally also Concurring Statement, *Northampton Media Associates*, *supra*, 3 FCC Rcd at 5175, which stressed:

> the importance of the rule of law set forth, once again, in *Religious Broadcasting Network:* a financial certification based upon no more than the undocumented assurances of a party (or parties) other than a recognized financial institution is utterly invalid - and more. It will be considered a false

certification, for which summary disqualification will follow. As indicated at the outset, to the extent that the Commission continues to rely on certification in lieu of demonstrative evidence of financial ability, an applicant's certification must be based upon actual documentation; not upon a good faith "belief"; nor upon speculation or personal observation . . . .

33. Therefore, given the undisputed facts and circumstances of record, Family never possessed "reasonable assurance" of its funds at the time it certified and filed its application. A consistent line of cases trailing the Commission's switch to applicant financial certification has enforced the Commission's basic certification standards. Yet, as we anticipated long ago in *Dutchess Communications, supra*, and as the Commission acknowledged in its *Public Notice on Random Verification of Financial Certifications, supra*, the instant proceeding is merely the latest in an elongating line of cases wherein certifying applicants are later exposed at hearing as basing their initial certifications, for example, on no more than faith in the divine, *Central Alabama Broadcasters, Inc.*, 97 FCC 2d 654 (Rev. Bd. 1984), *review denied*, FCC 84-508, released October 26, 1984, *aff d sub nom. Oyster v. FCC*, 776 F.2d 365 (D.C. Cir. 1985); faith in the future, *Pepper Schultz*, 103 FCC 2d 1052 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1476 (1987), *remanded*, 3 FCC Rcd 1200 (1988); worthless bank accomodation letters, *Dutchess Communications, supra: California Broadcasting Corporation*, 2 FCC Rcd 4175 (Rev. Bd. 1987); and on friends of the church whose resources are unconfirmed by the certifying applicant, *Washoe Shoshone Broadcasting, supra*. On this record, Family's financial certification was no more in accord with Commission requirements than those in the aforecited. Family has failed utterly to demonstrate compliance with our liberal certification requirements, all plainly explained in the Commission's application form, its instructions, and in our precedent.

34. Consequently, neither L&K nor Family possessed "reasonable assurance of basic elements of their respective proposals at the time they certified and filed. L&K had no "reasonable assurance" of a transmitter site; Family had no "reasonable assurance" of funds from its alleged benefactor. Therefore, we must conclude that each applicant is lacking a specific basic qualification to be a Commission licensee. With the disqualification of both competing applicants, we are not unmindful of the fact that institution of new FM service to Port Huron, Michigan will be deferred. However, as we reiterated in *California Broadcasting Corporation, supra*, 2 FCC Rcd at 4192-4193 (Rev. Bd. 1987)(both remaining applicants basically disqualified):

> We recognize, with profound regret, that some critical observers may behold this . . . hearing record, and the consequent disqualification of both of the immediately available competing applicants, as palpable support for the forlorn premise that "the system has failed" in that many years of furious and costly litigation have left the FCC, and - more important- the . . . public, bereft of a legally eligible grantee for the . . . permit so long under litigative siege. We however, take the oppositive view, and believe instead that the unusual result of this is, in fact, a resounding vindication of the sanguine proposition that the Commission's adversary hearing system does work *precisely as intended*, and that the trial-type process utilized here has fully and faithfully protected the American public's very limited treasury of immensely valuable broadcast frequencies.

Similarly, in *Coastal Bend Family Television, Inc.*, 95 FCC 2d 551, 553 (Rev. Bd. 1983)(where no qualified applicant emerged), we repeated that: "it is truly better to have an empty house than a bad tenant." Here, as in *California Broadcasting* and *Coastal Bend*, the competing applicants have victoriously succeeded in proving, on the record, precisely that which each set out to do: That its opponent lacked either the basic "technical" and "financial" qualifications mandated in Section 308(b) of the Communications Act, 47 U.S.C. §308(b).

35. ACCORDINGLY, IT IS ORDERED, That the applications of Port Huron Family Radio, Inc. (File No. BPH-830325AE) and L&K Broadcasting, Inc. (File No. BPH-830714AC), ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] The ALJ, while making requisite findings of fact under the standard comparative issue, neglected to set forth any conclusions of law with respect thereto. This omission was inconsistent with the direction of Section 1.267(b) of the Commission's Rules, 47 C.F.R. 1.267(b), which provides that: "Each initial and recommended decision shall contain findings of fact and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record . . ." Although the ultimate disqualification of both applicants herein renders the ALJ's error harmless in the context of this case, we do not recommend this departure from the normal Commission adjudicative practice wherein ALJ's take evidence and make findings of fact and conclusions of law on all issues in order to prevent needless remands. *See RKO General, Inc.*, 61 FCC 2d 1062, 1064 (1976); *Alkima Broadcasting Co.*, 30 FCC 932, 933 n. 2 (1961).

[2] L&K's Petition was denied by *Memorandum Opinion and Order*, FCC 86M-3694, released December 24, 1986, wherein the ALJ noted: "L&K's concession that it did not have reasonable assurance for its [original] site directs the conclusion that it does not have good cause for amending".

[3] Niederhauser's affidavit (Family Exh. 13) also claims that L&K's Site C would be subject to the City of Port Huron Zoning Ordinance Section 39-35:

> RADIO TELEVISION TOWERS. Commercial radio, television and other transmitting or relay antenna towers shall be permitted in any commercial or industrial zoning district, subject to compliance with applicable Federal, State and City ordinances. The minimum setbacks for such towers from all abutting streets or adjacent property

> shall be a distance equal to the height of such tower, with no zoning ordinance restrictions on tower height. The structural plans must be approved by the Chief Inspector.

Thus, Niederhauser concluded that L&K's:

> Construction of the proposed 365 foot high radio tower on the aforementioned [Site C] would not be allowable under the zoning ordinance of the City of Port Huron because [Site C] is 100 feet in width, which would not permit placing the center of the proposed 365 foot high tower a "distance equal to the height" from "adjacent property" as required by the Zoning Ordinance.

Our decision here, of course, does not rest on this purported zoning obstacle. *See Gareth F. Garlund and Annie White Garlund (KIQO)*, 69 FCC 2d 2006 (1978); *Radio Ridgefield, Inc.*, 47 FCC 2d 106 (1974).

[4] In 1985, when Monicatti was advised by his counsel that he did not have reasonable assurance, it is rather incredible that he would not have recalled his meeting with Cooper (the real estate agent). When attempts were made (in 1986 and 1987) to overturn the Bureau's rejection of L&K's petition for leave to amend to a new site, it is similarly incredible that Monicatti would not have recalled every step taken to secure the original site, a matter that could be central to a review of the Bureau's action. Additionally, concerning L&K's remaining hearing ploy that its Site C (on which it obtained a last-minute, 90-day option) was actually encompassed in its originally specified site (Site A), is confuted by the facts. E.g., Monicatti conceded that the site for the tower which L&K now proposes (Site C) is, in fact, in a different location. The geographic coordinates for this site are markedly different from those specified in L&K's original application, and, in spite of numerous attempts to otherwise amend its application, L&K never attempted to amend to specify these new coordinates. Moreover, the tower will no longer be supported by guy wires but will be self-supporting. Indeed, the new site is simply inadequate to allow for guy wires. L&K's original application specified a guyed tower (hence the necessity for 4-5 acres of land). However, L&K's application was similarly never amended prior to hearing on the site issue to reflect a self-supporting tower. Moniciatti also concedes that, in making that site proposal, he did nothing to determine whether Site C was suitable for the proposed self-supporting tower.

[5] Gardner, it is alleged, consulted with Doorn about staffing plans. Gardner allegedly contacted equipment suppliers about equipment and tower costs, and Paul Stewart, a Grand Rapids, Michigan radio consultant, about costs (Family Exh. 15, at 2; Tr. 559). In addition, Gardner claimed that he spoke with a Grand Rapids accounting firm that did broadcast accounting about operating costs.

[6] Family did submit with its hearing exhibits a financial statement of Clark as of *October 1, 1987*, portraying liquid assets of "40,000 cash in banks". Other assets included residences in Michigan and Arizona. The Michigan residence is valued at145,000 but is encumbered by a 100,000 mortgage and the Arizona residence is valued at145,000, encumbered by a 121,000 mortgage. Other assets included Clark's business, an asset designated "Greenville Income Partners", and "oil and gas interests - oil wells" at400,000. Clark's non-mortgage liabilities amounted to some67,000. Also proffered were bank letters addressed to Family and, separately, to Clark, from two different banks (both dated October 19, 1987) setting forth their willingness to loan Family200,000, and Clark250,000, respectively (Family Exhs. 14,16). All these assets are not necessarily "liquid" assets as that term is defined by the Commission. In former FCC Form 301, Section III, page 3, Question 4(b), 1981 ed., the Commission provided the following definition of "liquid assets":

> The term current and liquid assets refers to items such as cash, or loan value of insurance, government bonds and publicly traded securities (provided, however, that such securities must be identified by the type of security, name of issuer and the name of the market or exchange on which traded, at their current market value), or other assets which may be readily used or converted to provide funds to meet the proposed commitments. Current assets such as accounts receivable which result from normal operation of a business, inventory, etc., are not considered as a readily available source of funds without a specific showing that such assets can be relied upon to meet proposed commitments. *However, if accounts receivable have been "aged" and certified collectible within 90 days by a professional accountant, three-fourths (3/4) of such accounts* will be treated as "liquid." If a balance sheet does not clearly indicate liquid and current assets sufficient in amount to meet current liabilities and in addition, sufficient liquid assets to meet the proposed commitment, it should be supplemented by a statement showing the manner in which non-liquid assets will provide such funds. When the applicant relies upon "non-liquid assets," a statement must be submitted showing the extent to which such assets have liens or prior obligations against them.

The foregoing considerations are of little moment, however, since the record demonstrates that Family simply did not possess "reasonable assurance" of the funds relied upon at the time it certified its application. In the absence of this critical factor, the subsequent financial submissions of Family are unavailing. *George Edward Gunter*, 104 FCC 2d 1363, 1366 (Rev. Bd. 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-388

In the Matter of Amendment of
the Commission's Rules for Rural
Cellular Service

FOURTH REPORT AND ORDER

Adopted: April 21,1988; Released: May 18, 1988

By the Commission:

INTRODUCTION

1. On February 19, 1988, we released a *Third Notice of Proposed Rule Making* (*Third Notice*), 53 Fed. Reg. 5020 (1988), in this proceeding, proposing to amend the rules to require applicants proposing to provide cellular radio service to Rural Service Areas (RSAs), to demonstrate a firm financial commitment at the time they filed their applications.

2. We made these proposals after reviewing the comments filed in response to the *Further Notice of Proposed Rule Making* (*Further Notice*), released November 7, 1986,[1] in this proceeding. These comments suggested that we require RSA applicants to demonstrate that they had a firm financial commitment at the time they file their applications. In the *Third Notice* we reiterated our desire to maintain the integrity of our licensing processes by limiting RSA applicants to those who sincerely intend, and are able, to provide high quality cellular service.[2] In the *Third Notice* we stated that the processing of applications for Metropolitan Statistical Areas (MSAs) 121-305 revealed that our decision to change the required financial showing was not sufficient to prevent the filing of speculative applications. Parties filed numerous Petitions to Deny challenging the financial qualifications of such entities and challenging the assertion that they were the real party in interest in their application. These controversies have delayed the granting of construction permits and the provision of service to the public. Thus, to preserve the integrity of our licensing process, we proposed that *all* RSA applicants show, at the time of filing, either that they have funds available or that they have a firm financial commitment from a recognized financial institution. We also proposed to allow an applicant to file applications in more markets than its commitment would cover, but we proposed to limit the award of the grants to the number of applications its financial commitment would cover. We invited comment on whether to implement these proposals and on alternative measures that may be effective in obtaining our objectives.

3. After thoroughly considering all of the comments and reply comments, we adopt our proposal with certain modifications. As stated above, our reason for proposing the rule amendment was to prevent the filing of speculative applications. After review of the comments, we conclude that there is no evidence of abuse of the licensing process by wireline carriers. Therefore, wireline carriers must show their financial qualifications within 30 days of the public notice announcing their status as tentative selectee, sole applicant or surviving entity in a full market settlement, as required by the current rules. However, the comments do lead us to conclude that there have been abuses by non-wireline applicants. Therefore, a firm financial commitment will be required of all non-wireline RSA cellular applicants at the time they file their individual applications for each cellular market. All non-wireline applicants must demonstrate that they have the funds available or that they have received a firm financial commitment from a lender to provide the necessary funds. Either form of funding must be sufficient to cover the costs of construction, operation, and other initial expenses for one year. The financial showing must accompany the application. We further conclude that non-wireline applicants may use the commitment for each application filed in accordance with the requirements we have set forth. In order to allow non-wireline applicants who are serious about carrying through with their proposals the flexibility to structure their financing and yet deter those applicants who either lack the financial ability or who apply for purposes of speculation, we adopt specific requirements for (1) obtaining the necessary commitment from lenders, (2) relying on personal or internal resources, and (3) relying on financing obtained through a parent corporation.

I. FIRM FINANCIAL COMMITMENT WHEN FILING APPLICATIONS AND APPLICABILITY TO WIRELINE APPLICANTS

Comments

4. Many commenters [3] agree that we should require a financial showing at the time applications are filed. However, the extent of their support varies and many parties propose some modification to our proposal. A large number of commenters support our proposal as the simplest and least burdensome way to discourage insincere applications and to expedite service to the public. (CTIA, American SMR Network, Bradley Cellular, Palmer Communications, McCaw, Pactel.) Some commenters claim that the proposed requirement is needed to solve problems created by the filing of speculative applications in MSA markets 121-305. (Lewis, McCaw.) Lewis maintains that the absence of a requirement for a financial showing prior to lottery enabled application preparers to market large numbers of applications at little cost. Consequently, according to Lewis, the average number of applications per market increased from 173 in MSAs 91-120 to over 500 in MSAs 121-305. McCaw observes that while 5,000 applications were filed for MSAs 91-120, 15,000 were filed for markets 121-150; and 38,000 were filed for the last 65 MSAs. Under such circumstances, according to CTIA, the chances of legitimate applicants are overwhelmed by frivolous and speculative applications. CTIA notes other consequences of our earlier decision not to require a financial demonstration upon filing. It submits that half of the non-wireline winners in markets 121-305 were subject to petitions to deny. CTIA also estimates that at least 80% of non-wireline permits awarded have been transferred or are in the process of

being transferred. This activity, it contends, is a further indication that many applicants were not serious about providing service to the public. These commenters submit that if such speculation continues unchecked for RSA markets, there will be disastrous consequences for our RSA cellular licensing scheme. According to McCaw, the Commission received nearly 100,000 applications in the 305 MSAs but we can expect more than 200,000 applications for non-wireline authorizations for the RSAs under current filing procedures. McCaw and Lewis observe that consulting firms and promoters, in anticipation of the filing for RSAs, have already sold and stockpiled thousands of applications. Moreover, in support of our prosposal, CTIA notes that MSA operators may find it competitively necessary to buy out adjacent speculative permittees in RSAs. It maintains that this possiblity would adversely affect the capital of the acquiring cellular operator and limit its competitive flexibility in the marketplace.

5. Other commenters assert that if we hope to change the current environment for licensing rural cellular facilities, we should adopt the proposed requirement. They contend that requiring a firm financial commitment as proposed will help deter speculative applicants and discourage mere lottery ticket operations from filing. (Cellular Holdings, Cellular, Inc., CTIA, McCaw.) Providence Journal asserts that while our proposal cannot ensure that only sincere applicants will be able to apply, it should ensure that only financially qualified entities will apply, thereby sharply reducing the number of frivolous applications. Some commenters assert that building one or few RSAs will not require huge sums and, therefore, it should not be a great burden to demonstrate the availability of the necessary funds. (Bradley Cellular, CTIA.) CTIA also notes that if implemented effectively, the proposed requirements should impede filing of speculative applications by thinly or non-capitalized entities without undue burden on serious applicants. PacTel maintains that given the Commission's goal of expeditious construction and implementation of service, the reduction in the number of applications that the Commission would otherwise have to process outweighs the higher cost of filing an application. Cellular Holdings and Lewis assert that our proposal will have the effect of reducing the field of applicants in each market to only sincere applicants and the public interest will be served by the resulting reduction in paperwork and the eliminaton of the cost of processing speculative applications. CTIA projects that the number of petitions to deny would therefore decrease and supports taking strong action against unjustifed challenges to selectees.

6. Other commenters, while in favor of the proposal, express concern that it will not limit speculative applications. (Lewis, Telocator.) Lewis predicts that the trend for application preparation firms to generate a large number of applications in order to survive will continue for RSA filings. Telocator submits that as long as applicants can rely on "application mills" to prepare applications at low cost and cellular system equipment manufacturers to construct facilities and operate systems, large numbers of applications will be filed. Even under the proposal, speculators could still join together to obtain the line of credit necessary, Telocator states. In addition, Telocator and Cellular, Inc. argue that the proposal should not apply to RSA applicants that are currently cellular licensees or common carriers. According to these commenters, licensees have already demonstrated that they are *bona fide* applicants and are qualified under the Commission's rules. Telocator maintains that requiring current licensees to meet the proposed requirement could disserve the public by requiring them to tie up lines of credit that could be used to improve and expand existing services while RSA applications are pending.

7. A number of commenters contend that there is an insufficient basis for our proposal. (TCC, USICTA, Genesis, Romulus.) TCC submits that we cite no evidence in the *Third Notice* linking an applicant's intention to construct and operate with its financial ability to obtain an unrestricted line of credit. Romulus asserts that the record does not show that the abuses by applicants are related to financial qualifications. Other commenters maintain that no tentative selectee in markets beyond 120 was disqualified for failing to demonstrate a commitment. (USICTA, Genesis, Robert Kelly, Vega.) Romulus notes that we did not provide any example of any cellular licensee who was incapable of carrying out its proposal because of financial difficulties. Genesis adds that there is no evidence that delays in processing, granting and instituting service are due to a lack of firm financial commitments prior to lottery. Further, USICTA asserts that there is no basis for assuming that the requirement of a pre-lottery firm financial commitment will eliminate petitions to deny. TCC maintains that in all probability, the filing of such petitions is likely to increase because the imposition of a new standard will generate new controversies in need of resolution. USICTA argues that the *bona fides* of an applicant's pre-lottery financial commitment may, in fact, be more frequently challenged than a financial commitment based on an applicant's selection in a lottery. Other commenters assert that an applicant with access to ample credit is not necessarily more sincere. (Contel, CCI, Larsen, Genesis, Leaf River, Michigan Group.) Vega asserts that based on its past experience, applicants with "deep pockets" are less likely to build and develop the systems, and more likely to sell early. Vega and Genesis state that mass marketers possess the resources and ability to seek and secure firm financial commitments and offer them as part of a package. Moreover, many of the so-called speculators are aware that financing is relatively easy to obtain through vendors like Astronet and Motorola. (Vega, Dean Hill.) Larsen argues that the proposal may actually increase speculation, since large companies with significant liquid assets who are not necessarily involved in cellular businesses may be encouraged to invest. SSE states that while increasing the role of large wealthy speculators, our proposal will foreclose many sincere and qualified applicants and restrict small investors.

8. Commenters opposing our proposal also maintain that the proposal is unnecessarily burdensome. Romulus asserts that the proposal will increase the costs of building RSA systems. Dean Hill estimates that fees for a firm financial commitment will be significant, running between $10,000 and $40,000, and that they could cause a diversion of capital from the actual construction of the system. Dean Hill speculates that the requirement would have the effect of tying up roughly $11.5 billion in capital from the nation's lending institutions, and, as a result, certain small concerns would be unable to have access to sorely needed capital. CCI maintains that some sincere applicants might be deterred if they have to expend significant amounts of capital on fees to assure the continu-

ing availability of the capital through the period necessary to process the applications and to conduct lotteries. Larsen asserts that existing cellular operators will have to recommit capital designated for MSA construction to the RSA applications. Larsen maintains that if the majority of the RSA construction permits are awarded to the few existing MSA operators who possess the assets to meet the Commission's proposal, the result will be excess profits, less efficient operation, and reduced innovation from the operators. Other parties believe the problem can be solved more appropriately through limiting eligibility to adjacent system operators. (Cagal, Telocator.) Some commenters assert that the 200 filing fee and the processing rules already eliminate many solo applicants. (Genesis, Leaf River.) In addition, they maintain, other Part 22 applicants are not required to show financial commitments. Opposing commenters contend that the main reason for the large volume of applications is that applicants merely "front" for, or convey a partial ownership interest to, an undisclosed principal. (Leaf River, TCC.)

9. Several commenters opposing our proposal suggest that we reinstate the reasonable assurance standard. (Michigan Group, Leaf River, TCC, CEA Reply.)[4] The crux of their argument is that this standard, tested over a number of years for broadcast and common carrier applications, has eliminated unqualified applicants while permitting those with financing contingent upon receipt of an authorization to continue to prosecute their applications. Michigan Group favors a reasonable assurance standard tying the funds to the loan purpose. Leaf River recommends coupling a pre-lottery reasonable assurance showing with a post-lottery firm financial requirement. Lewis replies that the reasonable assurance standard will not deter mass filings, because the commitment letters utilized under the reasonable assurance standard are merely forms involving no capital outlay and no real commitment.

10. Additionally, many commenters addressed the issue of whether the pre-lottery financial showing requirement should apply to wireline applicants. Most major wireline MSA operators were strongly in favor of a wireline exemption (ALLTEL, Ameritech, BellSouth, GTE Mobilnet, NYNEX, Southwestern Bell.), as were the majority of the independent wireline carriers and the parties representing them. (Dean Hill, OPASTCO, the Ad Hoc Rural Consortium, AIWCA, FWC *et al.*, and CACTS.) Of the possible wireline RSA applicants, only Century and Rochester Telephone Company oppose a wireline exemption. Several other potential wireline applicants including Centel and Southwestern Bell are not opposed to the imposition of the finanical showing requirement on both wireline and non-wireline applicants. Century and Cybertel argue that the absence of wireline abuses in the MSA context does not ensure the same situation for RSAs, particularly given the increased number of eligible wireline operators. Century maintains that companies who cannot arrange satisfactory financing should not be permitted to file RSA applications for the same reasons we are limiting the non-wireline applicant pool to those who are financially qualified.

11. TCC also opposes a wireline exemption, contending that no particular group of potential applicants is more likely than another to sell its interest in the license and therefore that generalizations about certain groups being more "sincere" than others are not necessarily correct. USICTA argues that wireline carriers should not be treated any differently from small non-wireline applicants. *See also* comments of Bradley Cellular Corporation, Victoria Cellular and Romulus.

12. In favoring a wireline exemption, many commenters assert that there is no evidence of wireline abuse of the lottery process. Moreover, they refer to precedent that we are obligated not to impose regulations in the absence of a supporting factual basis or need. *See generally, HBO v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977). Thus, these commenters argue that imposing rules designed to eliminate insincere applicants upon a group that has no history of insincerity, would be arbitrary and capricious agency action.[5]

13. Other commenters focus on the peculiar position of the rural wireline carriers and the burdens which the proposed requirement would place on them. Leaf River asserts that assets of these carriers are limited and that there are constraints on borrowings promulgated by the Rural Electrification Administration and local Public Utility Commissions. Other parties express concern that in the event of settlements among wireline applicants which are likely to occur, financial commitments already paid for by individual applicants would likely be supplemented by showings from the surviving entities. In these cases, the expenditures by individual applicants would be pointless. Ross & Hardies, Dean Hill, and Tri-County suggest that we permit partial settlement participants to rely on only one commitment. Such expenditures, in the view of other commenters, could divert capital from the design and operation of the systems when the applicants should be deemed qualified by virtue of their wireline presence. (Cellular, Inc., Nemont Telephone Cooperative, FWC Communications, Ronan/Merrimack County.) Ad Hoc Rural Consortium also maintains that the number of potential wireline applicants is limited by the presence requirement and that no purpose would be served by further limiting the pool of applicants. In addition, OPASTCO estimates that application costs could triple if we required wireline carriers to obtain a firm financial commitment, while no benefits would be achieved. Finally, several parties argue that the proposal would unjustly deny wireline carriers RSA market entry when the same wireline carriers were unable to apply for most of the MSA wireline opportunities because they were not eligible. (Leaf River, CACTS.)

Discussion

14. After review of the comments, we conclude that we should adopt our proposal to require a firm financial commitment showing at the time RSA cellular applicants file their applications for each cellular market. We are persuaded, however, that this amendment should only apply to non-wireline applicants and that wireline RSA applicants should be exempt from the pre-lottery firm financial commitment requirement. Wireline applicants will, of course, continue to be subject to the requirement that they furnish a firm financial commitment within 30 days of the public notice announcing their status as tentative selectee. *See* Rule 22.917 (b). This Commission is under an obligation not to impose regulations where there is no factual basis or need. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977). We have no evidence that wireline applicants previously abused the lottery process, and nothing to suggest the need for regulatory measures designed to prevent the same from occurring in the RSA context.

15. The pool of potential wireline applicants is sufficiently distinguished from potential non-wireline applicants to warrant different treatment. Eligibility to apply for block B RSA licenses is limited to those entities with a landline presence in the RSA applied for. Thus we anticipate significantly fewer wireline applications being filed and less need to reduce administrative burdens in this respect. We also expect that wireline applicants will be likely to make every possible attempt to follow through on cellular proposals in order to augment the variety of telephone services which these companies currently offer customers.

16. On the other hand, we conclude that the firm financial commitment standard should be adopted with respect to non-wirelines in order to deter speculative applicants from filing applications.[6] Therefore, all non-wireline applicants will be required to demonstrate that they have the necessary funds available or that they have received a firm financial commitment from a lender to provide those funds. The financial showing must be included in the application. If an application that is selected first in the lottery does not include a firm financial commitment, it will be dismissed.

17. We disagree with those who contend there is no relationship between requiring a financial showing and the intention of the applicant making such a showing to construct and operate the proposed system. Requiring a firm financial commitment at the time the application is filed will not guarantee that an applicant is sincere, however an applicant that has expended the time and money required to secure financing for its proposed project is more likely to carry through with its proposal than one who has merely signed an application for which little or no money was paid. Many of the RSAs are large, sparsely populated areas. For this reason we believe that it is important that each applicant carefully review the estimated cost of constructing and operating its proposed system to be certain it is economically viable. We believe that the process of obtaining a firm financial commitment will focus an applicant's attention on the economic viability of the proposed system and that as a result there will be a strong correlation between the obtaining of a firm financial commitment and the sincerity of the applicant.

18. We also disagree with those commenters who claim that the problem is not the financial showing required of the applicant, but rather that some of the MSA applicants may not have been the real party in interest in their applications. We believe that the financial showing is the primary "applicant unique" portion of an application. Without a financial showing requirement, all applicants can submit identical applications except for the name and address of the applicants. Many of the MSA lottery winners were challenged with allegations that they were not the real parties in interest behind their applications. The fact that many applicants utilized identical bank letters under the reasonable assurance standard was one of the factors that raised real party in interest questions in the Round IV filings (markets 91-120). The real party in interest problems delay service, waste resources and challenge the integrity of our licensing process. Requiring a firm financial commitment that is related to the creditworthiness of the individual applicant will clearly make it more difficult for those who would try to skew the lottery process by filing multiple applications in the names of friends or associates. The process of obtaining the firm financial commitment, in itself, would make this more difficult to do. We also point out that since requiring the firm financial commitment will likely mitigate real-party-in-interest problems, it is also likely to reduce the number of petitions to deny that are filed because many of these filed in conjunction with the MSAs, were based on real-party-in-interest allegations.

19. We recognize that there are costs associated with obtaining a firm financial commitment and that the money expended for these commitments may in some sense reduce the funds available to build both MSA and RSA systems. However, these costs are usually a small fraction (usually 1%) of the total cost of constructing and operating the system for one year. We must balance these costs against the benefits associated with requiring firm financial commitments at the application stage. The benefits include a reduction in the number of speculative applications, the increased likelihood that a sincere applicant will win a lottery, the speedier service to the public, better qualified applicants, and the resulting smaller numbers of petitions to deny, and, finally, the ready availability of funding once a construction permit is granted. We conclude that the benefits associated with the firm financial commitment requirement far outweigh the small cost involved. With regard to the argument that if we do require a financial showing at the application stage it should be a reasonable assurance showing rather than a firm financial commitment showing, we disagree. The reasonable assurance standard in a lottery setting amounts to little more than having a bank write a letter "to whom it may concern" stating that it is a bank that lends money to qualified persons for financially sound projects and that if the applicant wins a lottery and meets the banks standards it intends to lend the applicant the money. We do not believe that using this standard would achieve the desired results.

II. MULTI - MARKET APPLICATIONS

Comments

20. In the *Third Notice*, we also proposed permitting applicants to file in more markets than their financial commitments would cover, subject to the condition that we would award grants only for the number of markets that would be covered by their financial commitment. Several commenters support this proposal. They assert that requiring an applicant to obtain a firm financial commitment for every market in which it files would be unreasonable and that even a large company could not be expected to obtain 423 such commitments. (Cellular Holdings, Cybertel.) USICTA adds that the firm financial commitment standard should be related to the statistical probability in the lottery process. To maximize the chance of winning even one market, many applicants can be expected to apply in either all or a substantial number of markets. USICTA argues that if an applicant has already received a firm commitment for at least one market, it has not entered the lottery as a speculator lacking ability to construct and operate at least one system. Some commenters suggest allowing an applicant that has been selected in more than one market to obtain an increased financial commitment to cover the additional markets after it is selected. (AIWCA, Cellular Holdings, USICTA.) Cybertel suggests that in order for applicants to obtain firm financial commitments at reasonable costs, the lotter-

ies for each RSA cellular round should be conducted separately and the results announced prior to requiring applications to be filed in the next round. In this manner, applicants minimize the unnecessary costs of obtaining additional commitments by "rolling over" firm financial commitments from losing applications in the prior round. Genesis suggests specifying an amount that must be satisfied by all multi-market applicants (e.g. $1 million) through acceptable financing alternatives. SSE concurs, suggesting an amount equal to twice the minimum amount required for single market applicants.

21. Several commenters contend that this proposal would only encourage speculation, because applicants would have the incentive to file in multiple markets to increase their chances of winning. (McCaw, NYNEX, and Dean Hill.) These commenters also note that the limitation on awarding grants would encourage applicants to select only the most lucrative RSAs, thus delaying service to the RSAs with less economic potential. Southwest Bell and NYNEX recommend that we require each application to specify all RSAs for which the applicant intends to file, and the firm financial commitments available for each market.

Discussion

22. We adopt our proposal concerning the funding of multi-market applications, but modify it to reflect the reality of implementing our licensing scheme based on lottery, as suggested by the supporting commenters. At the same time, we believe that the specific requirements we adopt will assure that applicants undertake a thorough analysis of their proposals and will therefore deter speculation. We conclude that an applicant must demonstrate in its application that it has either a firm financial commitment or available resources sufficient to construct and operate the proposed system for one year.[7] We agree with commenters Cellular Holdings, Cybertel and USICTA that there are valid reasons to provide a means for funding prosposals for more than one market and conclude that the same commitment may be used for each application filed. Accordingly, we will impose the following requirements: a) Where an applicant supplies a financial commitment that is not contingent upon the applicant being awarded a construction permit, the commitment need not be market-specific and can be applied to any market or markets applied for as long as the commitment is sufficient to cover the cost of the proposed RSA system(s); b) Where an applicant provides a firm financial commitment that is contingent upon its obtaining a construction permit, and which is also restricted on its face to specific markets, it can only be used for markets to which it refers; c) Where an applicant provides a contingent firm financial commitment that, on its face indicates that the bank or lending institution has reviewed the projects for which the applicant is filing but is not restricted to any specific market, it may be applied by the applicant to any market for which the applicant files as long as the commitment is sufficient to cover the costs of the proposed RSA system(s). If an applicant does not win in a lottery, it may reapply its commitment to its applications for the next lottery consistent with the above requirements.[8] Additionally, applicants that win in a market must obtain a new firm financial commitment for subsequently filed proposals unless the firm financial commitment first obtained is also sufficient to cover the next RSA system(s) proposed. If an applicant is relying on a commitment that does not provide sufficient funding for multiple RSA proposals and the applicant wins more than one, it will have 30 days after the date of the public notice announcing it as the lottery winner of the additional market or markets to provide the additional financial showing required.

III. CONTINGENT FINANCIAL COMMITMENTS

Comment

23. Most commenters oppose requiring that lines of credit from third parties be independent of, and not contingent upon, the grant of a construction permit. Those in support of the proposed requirement argue that permitting applicants to rely on conditional financing would continue to encourage the speculation which we seek to eliminate. Some of these comments emphasize the ease with which so many MSA applicants were able to secure financing through equipment vendors (Robert Kelly), while others cite the ease with which "application mills" have been able to secure financing for a multitude of applicants for whom they have prepared applications. (CCI, Lewis, Telocator.)

24. Two major concerns emerge from the comments opposing the requirement for non-contingent lines of credit. The first addresses the possibility of excluding sincere applicants who would be unable to obtain credit on terms that did not take the grant of the construction permit into account. The commenters who oppose non-contingent lines of credit agree that the chief problem with such a requirement is that the funds, once committed in such a manner, can be drawn down at any time, even prior to the grant of a construction permit. These commenters, including banks, claim that lending institutions, recognizing the possibility that the funds could be used for purposes other than constructing a cellular system, would extend credit on such terms only to very large companies. (National Council of Savings Institutions, Ozaukee Bank, First Wisconsin of Cedarburg.) Moreover, commitment fees for such arrangements are expected to run between ten and twenty thousand dollars. (Leaf River, Dean Hill, Tri-County, Benchmark, National Council of Savings Institutions.) Thus, commenters concerned with protecting the interests of smaller companies state that companies with sufficient assets can avoid the costs associated with third party financing altogether while the fees may discourage some smaller, but equally sincere, applicants. (Leaf River; the Michigan Group). According to Tri-County, local independent telephone companies may find it difficult or impossible to obtain financing on such terms since most are presently borrowers from the Rural Electrification Administration, which has a priority lien on the borrowing against local independent telephone companies' assets. Finally, Cellular Holdings observes that accepting contingent commitments, provided they are from recognized lending institutions, would enable smaller applicants to defer the fees until the funds are actually drawn down, thus also avoiding a potential windfall for lending institutions.

25. The second group of comments addresses standard banking procedures and regulatory concerns in that industry. Several of these commenters note that because funds so committed are immediately available, they count against banks' lending limits. Leaf River, National Council of Savings Institutions, and the Michigan Telcos voice

concern that assets of certain banks may be tied up prior to the time that cellular clients would borrow them, thus precluding the banks from lending the funds to other clients. Tri-County posits that the pool of available capital may not be large enough to accommodate all interested applicants.

26. Finally, many commenters argue that non-contingent financial commitments would be contrary to prudent lending practices, since lenders are expected to know the purposes of a loan and to restrict use of the proceeds accordingly. First Wisconsin Bank of Cedarburg also argues that a bank engaging in such practices would subject itself to a higher degree of regulatory scrutiny.

Discussion

27. After carefully reviewing these comments, we conclude that it would not be in the public interest to require a non-contingent firm financial commitment. Moreover, we are aware that some banks provided commitment letters to MSA applicants without regard to the creditworthiness of the individual applicant. This practice is unacceptable. Letters issued in this manner raise real party in interest questions since someone other than the applicant may have had contact with the lender, and give no real assurance that the loan will be made when the applicant's credentials are examined by the lender. Therefore, the financial commitment submitted with each application must state that the bank or other lender has examined the creditworthiness of the individual applicant and the financial viability of the proposed project. The commitment must also state that the institution is committed to lend a sum certain to that particular applicant and that the lender's willingness to enter into the commitment is based solely on its relationship with the applicant and is not in any way guaranteed by any entity other than the applicant. We are aware that this requirement will make it more difficult for some applicants to demonstrate satisfactorily their financial qualifications, but we do not see this as discriminating against smaller entities. The smaller applicants who are in good financial condition should be able to obtain financing on such terms, since lenders are free to restrict use of the loan proceeds to constructing and operating a cellular system.[9]

IV. QUALIFICATIONS OF FINANCIAL INSTITUTIONS

Comments

28. Several commenters address the issue of what institutions we should deem qualified to extend a firm financial commitment. They contend that the category should be limited to banks and savings and loan institutions. McCaw suggests that such a limitation would prevent "application mills" from serving as lenders. CTIA suggests guidelines to ensure that the commitment is from a *bona fide* source, and proposes limiting the category to "a federal or state chartered bank, savings and loan or other federally insured deposit institution and/or a financial institution with capital and surplus not less than $25 million." Southwest Bell proposes requiring that financial commitments be accepted only from banks subject to federal regulatory authorities. Domencich would require that the institution be chartered by either state or federal regulatory authorities, thus potentially excluding foreign institutions. McCaw proposes requiring that participating banks have a minimum amount of assets.

29. Several commenters recommend that we accept firm financial commitments from sources other than banks or savings and loan institutions. Centel, Inc. states that many applicant corporations receive capital from parent corporations, and that it is not uncommon among local exchange carriers to establish separate subsidiaries for cellular endeavors. Several parties also support the use of vendor financing as an alternative to recognized lending institutions. Robert Kelly and Vega argue that the ease with which a selectee can obtain such financing suggests that permitting such arrangements would not further the goal of stopping speculation. They argue that vendor participation would expedite RSA financing since many cellular operators currently have such arrangements with vendors and can rely on these relationships, at least in part, when seeking financing for RSA applications.

30. Many commenters also proposed guidelines for applicants planning to rely on internal funding. AIWCA proposes a certification from the applicant's board of directors certifying that a certain amount of capital is being held in escrow for the construction of the system. Chronicle Telecom and Romulus propose establishing a minimum net worth threshold for all applicants intending to rely on internal financing.

Discussion

31. We conclude that the public interest requires that firm financial commitments, in order to be deemed acceptable, must be obtained from either: (a) state or federally chartered banks or savings and loan institutions, (b) other recognized financial institutions, or c) financial arms of capital equipment suppliers. We are aware that many legitimate sources of financing exist apart from cellular equipment vendors or banks and thrifts. We do not wish to exclude legitimate non-bank institutions that are in the business of lending money or raising equity, such as investment banking houses. Nor do we wish to exclude smaller entities with the financial ability and genuine desire to finance cellular systems. Thus we cannot provide an exhaustive list of acceptable financing alternatives.

32. However, in contrast, we will not grant an application that contains a firm financial commitment from an entity that committed more funds than it had available. In this regard we will require questionable entities to demonstrate that they have the funds available to cover the total commitments they have made. Applicants are therefore advised that while we anticipate handling this matter on a case by case basis, we will carefully scrutinize all financial arrangements. It is our intention to limit outside sources of financing to those which have been proven to be *bona fide*, commercially acceptable sources. Thus we expect to eliminate the filing of multitudes of applications financially guaranteed by those who prepared them.

33. Those applicants intending to rely on personal or internal resources to finance their cellular proposals must submit financial statements certified within one year of the date of the cellular application, indicating the availability of sufficient net current assets to construct and operate the proposed cellular system for one year. Also, the application must include a balance sheet dated no more than sixty days of the date of the application that clearly shows the continued availability of sufficient net current assets to construct and operate a cellular system for one year. Finally, we require a certification by the applicant or an officer of the applicant's organization

attesting to the validity of the unaudited balance sheet. Applicants intending to rely on financing obtained from a parent corporation must submit these same materials.

Regulatory Flexibility Act - Final Analysis

34. *Reasons for actions and objectives.* The Rule Making action will promote efficient and expedient authorization of cellular licenses in the Rural Service Areas. It will also help eliminate abuses of our licensing processes and reduce possible speculation in cellular applications and licenses.

35. *Specific alternatives that could accomplish the same objectives.* We have determined that there are no specific alternatives that would maintain the integrity of our licensing procedure by ensuring that only sincere applicants with the desire and the means to construct cellular systems will apply. Tri County suggested demanding prompt construction after awarding the construction permit, but we believe that such a procedure will have little or no impact on speculative applications and may actually delay implementation of cellular service in the long run. Several parties also suggested instituting a prohibition against selling newly constructed systems or otherwise re-instituting certain anti-trafficking mechanisms but these suggestions will not be effective in reducing the number of RSA applications, and would do nothing to ensure that only qualified entities file RSA applications. Finally, other parties have suggested that we exempt current cellular licensees or common carriers from the pre-lottery financial showing requirement. However, exempting current cellular licensees would place small independent telephone companies who were ineligible as wirelines to apply for MSAs at a competitive disadvantage. Moreover, we chose to exempt wireline applicants from the pre-lottery financial showings chiefly because there is no history of wireline applicants abusing the lottery process. We have not received any evidence to persuade us that all common carriers should be exempt from the financial showing requirement that we are adopting.

36. *Issues raised by the public in response to the initial analysis.* Cagal and TCC contend that our initial analysis is incorrect because the proposed rules would prevent *bona fide*, sincere applicants that are small businesses from applying. FWC also disagrees with our previously stated conclusion that the new requirement would have a "negligible impact" on small entities, and argues that small independent carriers who are not selected stand to lose a substantial sum of money unnecessarily. We recognize that an applicant that pays to obtain a firm financial commitment and is not selected will lose whatever funds it expended to file its applications. Such funds include the cost of preparing the applications, the filing fees, and of course whatever funds were expended to obtain the firm financial commitment. We have no specific information about what incremental increase in the cost per application will result from the rule changes we are adopting herein. However, because we are allowing contingent financial showings and because we are also allowing the same financial commitment to be used for more than one application we do not believe that these costs will prevent qualified applicants from applying. The risk of not being selected must be borne by all applicants. The rules as amended still allow small businesses to apply for RSA cellular licenses while at the same time ensuring that all applicants have thoroughly considered the financial viability of each RSA proposal and are serious about providing cellular service.

ORDERING CLAUSES

37. WHEREFORE, for the foregoing reasons, Part 22 of the Commission's rules is HEREBY AMENDED as discussed herein and as shown in Appendix A to this Order; and

38. IT IS FURTHER ORDERED that the rule changes made herein WILL BECOME EFFECTIVE 30 days after publication in the Federal Register; and

39. The Office of Management and Budget has approved the colletion of information requirement contained in this rule. The OMB control number for is collection of information requirement is 3060-0046.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

APPENDIX A

RULES SECTION

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 22 - Public Mobile Service

1. The authority citation continues to read:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended (47 U.S.C. 154, 303).

2. Section 22.917 is amended by redesignating paragraphs (c) and (d) as (d) and (e) and adding a new (c) to read as follows:

Section 22. 917 Demonstration of Financial Qualifications.

* * * * *

(c) Rural Service Areas.

(1) A non-wireline applicant for a new station shall demonstrate, at the time it files its application that it has either a firm financial commitment or available financial resources necessary to construct and operate for one year its proposed cellular system. The firm financial commitment may be contingent on the applicant obtaining a construction permit. The same commitment may be used for each application filed, subject to the following provisions:

(i) Where a non-wireline applicant provides a firm financial commitment that is not contingent upon the applicant obtaining a construction permit, the commitment need not be market specific and may be applied to any market or markets applied for as long as the commitment is sufficient to cover the costs of the proposed RSA systems.

(ii) Where a non-wireline applicant provides a firm financial commitment that is contingent upon the applicant obtaining a construction permit and that is restricted on its face to a specific market or markets, the commitment may be used only for the markets to which it refers, and must be sufficient to cover the costs of the proposed RSA systems.

(iii) Where a non-wireline applicant provides a firm financial commitment that is contingent upon the applicant obtaining a construction authorization and that indicates that the bank or lending institution has reviewed the projects for which the applicant is applying, but the commitment is not restricted to any specific market, it may be applied to any market or markets applied for as long as the commitment is sufficient to cover the costs of the proposed RSA systems.

(2) If a non-wireline applicant does not win in a lottery, it may reapply its commitment to its applications for the next lottery consistent with the requirements of paragraph (c)(1) of this section.

(3) A non-wireline applicant that wins in more than one market shall file the firm financial commitment for the additional market or markets within 30 days after the public notice date when it is announced as the lottery winner of the additional market, unless its first firm financial commitment is sufficient to cover the costs of the additional market(s).

(4) The demonstration of commitment must include and be sufficient to cover the realistic and prudent estimated costs of construction, operating and other initial expenses for one year.

(5) The firm financial commitment required above shall be obtained from a state or federally chartered bank or savings and loan association, another recognized financial institution, or the financial arm of a capital equipment supplier and shall contain a statement that the lender (i) has examined the financial condition of the applicant including audited financial statements where applicable, and has determined that the applicant is creditworthy; (ii) that the lender has examined the financial viability of each RSA proposal for which the applicant intends to use the commitment; (iii) that the lender is committed to providing a sum certain to the particular applicant; (iv) that the lender's willingness to enter into the commitment is based solely on its relationship with the applicant; and (v) that the commitment is not in any way guaranteed by any entity other than the applicant.

(6) Non-wireline applicants intending to rely on personal or internal resources must submit (i) audited financial statements certified within one year of the date of the cellular application, indicating the availability of sufficient net current assets to construct and operate the proposed cellular system for one year; (ii) a balance sheet current within 60 days of the date of filing that clearly shows the continued availability of sufficient net current assets to construct and operate the proposed cellular system for one year; and (iii) a certification by the applicant or an officer of the applicant organization attesting to the validity of the unaudited balance sheet.

(7) Non-wireline applicants intending to rely upon financing obtained through a parent corporation must submit the information required by Section 22.917(c)(6)(i) through (iii) above, as the information pertains to the parent corporation.

* * * * *

APPENDIX B

Comments to Third Notice of Proposed Rule Making

Ad Hoc Rural Consortium [Armstrong Utilities, *et al.*]

Alliance of Independent Wireline Cellular Applicants (AIWCA)

ALLTEL Mobile Communications (ALLTEL)

Ameritech Mobile Communications (Ameritech)

American PMR Network Association (American PMR)

Astronet Corporation (Astronet)

Bell Atlantic Mobile Systems, Inc. (Bell Atlantic)

BellSouth Corporation and BellSouth Mobility, Inc. (BellSouth)

Benchmark Telecommunications

Bradley Cellular Corporation (Bradley Cellular)

Cagal Cellular Communciations Corporation (Cagal)

Carr Telephone Company, Drenthe Telephone Company, Hiawatha Telephone Company, Peninsula Telephone Company and Winn Telephone Company (the Michigan Group)

Cellular Communications, Inc. (CCI)

Cellular Equity Association

Cellular, Inc. and Nemont Telephone Cooperative, Inc.

Cellular Holdings, Inc. (Cellular Holdings)

Cellular Telephone Industry Association (CTIA)

Centel Cellular Company (Centel)

Century Cellunet, Inc. (Century)

Chronicle Telecommunications (Chronicle)

Committee for the Advancement of Cellular Telephone Service (CACTS)

Communications Transmission, Inc. (CTI)

Consolidated Telephone Company, Great Plains Communications Inc., Hamilton Telephone Company, Hooper Telephone Company, Northeast Nebraska Telephone Company and The Lincoln Telephone Company (the Nebraska Companies)

Contel Cellular, Inc. (Contel)

Cooper Communications (Cooper)

CyberTel Corporation (CyberTel)

Richard L. Fegn (Fegn)

First Wisconsin Bank of Cedarburg

FWC Communications, Inc., Ronan Telephone Company and Merrimack County Telephone Company (FWC Communications)

Genesis Enterprises, Ltd. (Genesis)

GTE Mobilnet Incorporated

Eric Kahan (Kahan)

Robert E. Kelly

Law Offices of Dean George Hill (Hill)

Leaf River Telephone Company and Alhambra-Grantfork Telephone Co. (Leaf River)

Peter T. Lewis and Lewis Telecom (Lewis)

McCaw Cellular Communications (McCaw)

Minnesota Telephone Association Rural Cellular Committee

National Council of Savings Institutions

National Telephone Cooperative Association (NTCA)

NYNEX Mobile Communications Company (NYNEX)

Odin Telephone Exchange Inc., Wabash Telephone Company Inc., Shawnee Telephone Company Inc., Hamilton County Telephone Cooperative, Schuyler Telephone Company and Ardmore Telephone Company

Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)

Ozaukee Bank of Wisconsin

PacTel Cellular (PacTel)

Palmer Communications, Inc. (Palmer)

Providence Journal Telecommunications, Inc.

Ralph Larsen & Son, Inc. (Larsen)

Kenneth L. Ramsey (Ramsey)

Rochester Telephone Corporation (Rochester Telephone)

Romulus Engineering (Romulus)

Satellite Systems Engineering (SSE)

Southwestern Bell Mobile Systems (Southwest Bell)

Telocator Network of America

The Cellular Corporation (TCC)

The Lowery Telephone Company of Lowery, Mn. (Lowery)

The Richard L. Vega Group (Vega)

Thomas Domencich, Inc. (TDI)

Tri-County Mutual Telephone Company (Tri-County)

United States Independent Cellular Telephone Association (USICTA)

United States Telephone Association (USTA)

Victoria Cellular Corporation (Victoria)

FOOTNOTES

[1] Amendment of the Commission's Rules for Rural Cellular Service, 1 FCC Rcd 499 (1986).

[2] We had previously changed the financial showing required for cellular applicants from a reasonable assurance of financing to a firm financial commitment. Cellular Lottery Reconsideration Order, 58 Rad. Reg. 2d (P&F) 677 (1985) (Reconsideration Order). We had also required the tentative selectee in the lottery, the sole applicant in a market or surviving entity in a full market settlement to make the firm financial commitment showing within 30 days of the public notice announcing such status. Cellular Lotteries (Further Reconsideration), 59 Rad. Reg. 2d (P&F) 407 (1985).

[3] We received comments from potential non-wireline and wireline applicants, associations representing members who may be applicants, consulting and engineering firms which prepare and market applications, financial institutions, and law firms. There are 52 comments and 27 reply comments. *See* Appendix B for a list of commenters.

[4] In MSAs 1-120, the prevailing standard with regard to financial ability was one of "reasonable assurance" that the funds needed to construct the proposed system and to operate it for one year would be available. *See* Cellular Radio Service (Lottery Selection) 58 Rad. Reg. (P&F) 677, 686-687 (1985).

[5] PacTel observes that no wireline selectee's financial qualifications have been challenged in the markets below the top 30, and that no wirelines have encountered serious problems obtaining financing. BellSouth and ALLTEL state that wireline companies would be more likely than non-wirelines to follow through on their cellular commitments given their pre-existing presence and investments in a particular RSA. NYNEX notes that based on its experience, it would expect wirelines to construct quickly, and NTCA states that wireline applicants are already experienced in capital-intensive common carrier communications, and that these companies are "financially sound and imbued with a public service ethic."

[6] *Third Report and Order*, CC Docket No. 85-388, released April 18, 1988, prohibiting partial settlements by non-wireline carriers and the transfers of interest in RSA cellular applications prior to the grant of construction permits.

[7] We are planning to use the figure of $750,000 as a benchmark for determining the average cost of a one-cell system. The lowest figure suggested by any commenter was $500,000. (Providence Journal). TDI estimated the costs to be between $500,000 and $750,000, and Palmer estimated the costs to range from $500,000 to $1 million. Other commenters including Satellite Systems Engineering and CTIA estimated the costs at1 million. Thus we feel that $750,000 is a fair estimate. Of course, if an applicant can demonstrate that this figure is not applicable to the markets in which it is applying, then it will not be bound by this figure.

[8] In all cases, however, a firm financial commitment letter must be attached to each application at the time it is filed.

[9] We also observe that institutions interested in financing cellular systems need not be overly concerned with exceeding lending limits, since commitments may be contingent. Second, it is accepted banking practice to sell "participation" shares of loans to other institutions. *See* Reply comments of CTIA.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-382

In re Applications of

WWOR-TV, INC. File No. BRCT-871221KE

For Renewal of License of Station
WWOR(TV), Secaucus, New Jersey

and

GARDEN STATE BROADCASTING LIMITED PARTNERSHIP File No. BPCT-871223KG

and

WHITELY COMMUNICATIONS File No. BPCT-880321KM

For Construction Permit
Secaucus, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: March 15, 1989; Released: March 24, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The Review Board has under consideration an appeal, and a separate motion for stay, filed March 1, 1989, by Garden State Broadcasting Limited Partnership (Garden State), from a ruling by Administrative Law Judge Richard L. Sippel (ALJ) rejecting its "work-product" privilege claims and requiring it to produce documents supporting the proposed testimony of its expert witness, Dr. Roger Johnson, prior to the taking of his deposition (currently scheduled for March 22, 1989). *See WWOR-TV, Inc.*, FCC 89M-603, released February 22, 1989. Dr. Johnson, who is expected to testify at hearing, was retained by Garden State to prepare an exhibit analyzing certain programming broadcast by WWOR-TV, Inc. (WWOR-TV), licensee of the facility that Garden State seeks to supplant in this proceeding. WWOR-TV filed oppositions on March 6, 1989, to both the appeal and the motion for stay.

STAY MOTION

2. We will deny the motion for stay. Garden State has not satisfied the four established criteria for issuance of a stay promulgated in *Virginia Petroleum Jobber's Ass'n. v. FPC*, 259 F.2d 921 (D.C. Cir. 1958), as interpreted in *Washington Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), to wit: (1) likelihood of success on the merits; (2) irreparable injury to movant; (3) insubstantial harm to others; (4) the larger public interest. Other than merely predicting a substantial likelihood of success on the merits, and assaying no injury to others, Garden State claims irreparable injury because it would be compelled to disclose a significant aspect of its direct case prior to the exchange of written direct testimony. We note, however, that "disclosure of work product," even "to the extent . . . such disclosure involves trial strategy," is not sufficient by itself to justify a stay. *See A.S.D. Answer Service, Inc.*, 56 RR 2d 233, 237 (1984). In any event, our concurrent disposition of Garden State's appeal obviates any basis for a stay.

APPEAL OF ALJ RULING

3. Garden State has made no persuasive argument for disturbing the ALJ's ruling. The "work-product" privilege doctrine expressly provides that "a party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant . . . or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26 (b)(3)(codifying *Hickman v. Taylor*, 329 U.S. 495 (1947)). *See also Boring v. Keller*, 97 F.R.D. 404, 405 (D. Colo. 1983).[1] The authorities cited by WWOR-TV further hold that the "opinion at which an expert witness arrives, and the underlying facts and opinions supporting the opinion, have traditionally constituted an exception to the work-product rule." 97 F.R.D. at 407 (and additional cases cited therein). Moreover, it appears that subsection (b)(4) of Rule 26 permits discovery of an expert who is expected to testify at hearing. The Notes to Rule 26 subsection (b)(4) state:

> Many . . . cases present intricate and difficult issues as to which expert testimony is likely to be determinative.
>
> * * *
>
> Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand . . . . Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side.

Federal Civil Judicial Procedure and Rules, §26 (b)(4) at 83 (West 1987).

4. Garden State argues that the ALJ erred in not reviewing the documents *in camera*, before denying its "work-product" privilege. It also asserts that WWOR-TV failed to demonstrate "substantial need" for the documents.[2] If, however, the underlying documents were legally discoverable, no necessity for *in camera* review was summoned. In this regard, the ALJ's *Order* offered that, if

any of the requested material was not linked to Dr. Johnson's testimony, Garden State could submit those documents for *in camera* inspection--and potential discovery exemption--by February 27, 1989. Moreover, WWOR-TV has represented that there is a "substantial need" for the underlying documentation of Dr. Johnson's testimony: "Dr. Johnson has apparently selected 100 hours of programming, out of the tens of thousands broadcast, to analyze," and WWOR-TV cannot anticipate which programming was selected or the assumptions made by Dr. Johnson in evaluating such programming.[3] It adds: "Denying WWOR-TV production now will also render the deposition of much less utility, prejudicing WWOR-TV's efforts to prepare for effective cross-examination and rebuttal of Dr. Johnson and his work."[4] By stark contrast, Garden State has cited no legal authority whatsoever for its claim that the requested documents are beyond appropriate discovery. In light of its abject pleading failure, we cannot here say that the ALJ has abused his ordinary discretion. *See Chronicle Broadcasting Co.*, 20 FCC 2d 728 (Rev. Bd. 1969)(ALJs are "delegated broad responsibility" for hearing and "to carefully manage" discovery procedures).

5. ACCORDINGLY, IT IS ORDERED, That the appeal filed March 1, 1989, as supplemented March 3, 1989, and the motion for stay, filed March 1, 1989, by Garden State Broadcasting Limited Partnership, ARE DENIED.[5]

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] The Federal Rules of Evidence governing civil proceedings generally govern Commission hearings, but may be "relaxed if the ends of justice will be better served by so doing." 47 CFR §1.351. Still, the FCC endeavors, whenever possible, to apply the Federal Rules of Evidence. *See, e.g., Commission Rules of Evidence*, 35 RR 2d 1321 (1975).

[2] We have not considered Garden State's allegations concerning the timeliness of motions before the ALJ, or the intended scope of the production ruling, since these are matters peculiarly within the province of the ALJ. With respect to the ALJ's reliance on Rule 612 of the Federal Rules of Evidence, we concur that the ALJ merely referenced that stricture as additional support for production of an expert's underlying documents. We do not reach the question of whether Rule 612, *simpliciter*, supports production of the instant documents.

[3] WWOR-TV Opposition at 4.

[4] *Id.*

[5] Because Garden State's motion and appeal are time-sensitive, we have made available pre-publication copies of this ruling to the parties and to the presiding ALJ.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-92

In re Application of

CATOCTIN BROADCASTING CORP. OF NEW YORK — File No. BR-810202VF, BR-840201UA

For Renewal of License of
Station WBUZ
Fredonia, New York

MEMORANDUM OPINION AND ORDER

Adopted: February 22, 1989; Released: March 24, 1989

By the Commission:

1. WBUZ is a 250-watt AM radio station in Fredonia, New York, a small city situated about midway between Buffalo, New York and Erie, Pennsylvania. Catoctin Broadcasting Corp. of New York owns and operates WBUZ. Catoctin's sole principal is Henry Serafin, who started with WBUZ as a salesman, was promoted to general manager, and eventually acquired complete ownership of the station in 1978. *Catoctin Broadcasting Corp. of New York*, 2 FCC Rcd 2126, 2128 ¶ 9 (Rev. Bd. 1987). This adjudication involves Catoctin's applications for renewal of its license following its 1978-1981 and 1981-1984 terms.

2. The Review Board concluded that Catoctin is unqualified for renewal on the basis of findings, among others, that Serafin had willfully and illegally discriminated in hiring; knowingly misrepresented material facts in Catoctin's renewal application and in sworn statements; willfully conducted fraudulent contests; and willfully and repeatedly violated public file and ascertainment requirements.

3. The principal pleading now before the Commission is Catoctin's application for review of the Review Board's decision, in which Catoctin argues that the Commission has misplaced the burden of proof in this case and that, if the Commission resolves the issues in this proceeding against Catoctin, the Commission should force Catoctin to divest itself of its station instead of denying its renewal applications. The Mass Media Bureau has filed an opposition to the application for review, as have the Chautauqua County Rural Ministry, Inc., the Dunkirk, New York, Branch of the National Association for the Advancement of Colored People, and the Dunkirk-Fredonia League of Women Voters, jointly referring to themselves as "the Objectors."

4. The Hearing Designation Order, FCC 85-155, 50 Fed. Reg. 19,229 (May 7, 1985) (HDO), in this proceeding designated seven issues against Catoctin, each of which the Review Board and the Administrative Law Judge (ALJ) resolved adversely to the licensee. 2 FCC Rcd 2126; Initial Decision of Administrative Law Judge Walter C. Miller, FCC 86D-52 (1986) (I.D.). Although Catoctin has failed to preserve its exceptions below in its application for review, we have nevertheless reviewed the entire record in this proceeding on our own motion due to the gravity of the actions ordered below. We have made findings and conclusions only as to the following three issues:

> (i) whether Catoctin misrepresented facts to the Commission and/or lacked candor about the consideration for employment and subsequent nonhiring of a black woman by Station WBUZ in October 1980; and whether in light thereof Catoctin violated 47 C.F.R. § 73.2080;
>
> (ii) whether Catoctin misrepresented facts to the Commission or lacked candor with regard to the date or dates on which it placed documentation regarding its ascertainment and problems/programs lists in the public file of Station WBUX during the 1978-1981 license term; and
>
> (iii) whether Catoctin violated 47 C.F.R. § 73.1216 during the 1981-1984 license term by not awarding a stereo as part of a "Comtrex" contest, thus failing to conduct the contest substantially as announced; and whether Catoctin misrepresented facts to the Commission and/or lacked candor about the conduct of the "Comtrex" contest.

See 2 FCC Rcd at 2126-27. Our review leads us to resolve each of these issues against the licensee and to conclude that Catoctin has engaged in serious misconduct by discriminating against a job applicant on the basis of race; by misrepresenting material facts to the Commission with the intent to deceive; and by failing to conduct a contest substantially as announced. These findings compel the conclusion that Catoctin is no longer qualified to remain a Commission licensee and that its application for renewal should therefore be denied. We find it unnecessary to resolve the other issues of misconduct designated against Catoctin. Accordingly, we neither affirm nor reverse the findings and conclusions of the lower decisions on those issues, and they are not a part of our final decision.

I. BURDEN OF PROOF

5. Catoctin contends that the Board erred in applying a "preponderance of the evidence" standard of proof rather than a "clear and convincing evidence" standard. It maintains that the Commission ought to apply the higher evidentiary standard because Serafin's reputation and rights to freedom of speech and of the press are assertedly at stake. Catoctin implies that its freedom of speech has been abridged because the Commission designated its renewal application for hearing at the instigation of persons who had taken offense at WBUZ's coverage of a controversial political issue and then allegedly tried to intimidate Serafin by threatening to oppose Catoctin's renewal application unless he would cede editorial control of the station's public affairs programming to them.

6. Because Catoctin's contention that the presiding ALJ and the Board applied an incorrect standard of proof rests on a claim of constitutional right, and given the severity

of our action herein, we will address this argument even though Catoctin is dilatory in raising it now, for the first time. The HDO placed the burden of proof as to every issue on Catoctin. We therefore assume that in contending that the burden of proof should have been higher, Catoctin must be understood to be arguing that the burden should not have been placed on Catoctin. We will therefore construe Catoctin's pleading as contending that, in light of the circumstances to which it refers, the first amendment and the due process clause require that its adversaries bear the burden of proving that its principal is guilty of disqualifying misconduct.

7. We are not persuaded by Catoctin's contention as to which party bears the burden of proof. Section 309(e) of the Communications Act states that ". . . the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burden[s] shall be as determined by the Commission." 47 U.S.C. § 309(e). In this regard, it is clear that the ultimate burden is on the renewal applicant to show that the grant of its application will serve the public interest.

8. Although the Commission has discretion to place the burden of proof for specific issues involving charges of misconduct on the petitioner or the Bureau, *D & E Broadcasting Co.*, 1 FCC 2d 78, 80 ¶ 7 (1965), where the principal information concerning the matters in issue are peculiarly within the knowledge of the applicant and involve the use of broadcast facilities, the burden of proof on such issues is regularly placed on the renewal applicant. *Elyria - Lorain Broadcasting Co.*, 6 RR 2d 191, 198 (1965). Moreover, examination of the record in this case makes it clear that, consistent with *D & E*, 1 FCC 2d at 80 ¶ 9, Catoctin was fully informed of the precise factual questions to be resolved, that the facts in issue were delineated, and that there was no unfairness in requiring Catoctin to bear the burden of proof on the specific issues in this proceeding.

9. Catoctin has cited no authority and has presented no analysis to persuade us that the motives of the intervenors in this renewal case should change our traditional exercise of discretion with respect to the assignment of the burden of proof. Although it is regrettable that the challenge to Catoctin's application in this proceeding may have arisen from a dispute between the petitioners and Catoctin regarding the licensee's programming on a controversial public issue, we cannot permit that circumstance to shield Catoctin from the serious violations that petitioners have uncovered.

10. We insist on licensees' compliance with our rules, policies and the Act. Therefore, if a petitioner brings to our attention evidence of misconduct that raises a substantial question as to whether granting renewal would serve the public interest, then we shall review a licensee's basic qualifications under our traditional policies, regardless of the petitioner's motivation. Of course, the programming dispute between the Objectors and Catoctin has in no way influenced our findings and conclusions in this proceeding.

11. Catoctin has failed to preserve exceptions to the particular factual findings of the decisions below, and in the ordinary case, our review of the record would go no further. Denying renewal by reason of disqualification, however, is a severe sanction. We have therefore undertaken a careful review of those findings and conclusions in light of the record in order to satisfy ourselves of the appropriateness of the sanction imposed here. As stated above, this review leads us to conclude that Catoctin is unqualified to remain a Commission licensee and that the most appropriate sanction in this case is nonrenewal of its license.

II. EMPLOYMENT DISCRIMINATION AND RELATED MISREPRESENTATION ISSUES

12. One of the designated issues in this proceeding involves Catoctin's hiring practices during its 1978-1981 license term. Specifically, the HDO set out for determination the question of whether Catoctin's principal, Henry Serafin, (1) misrepresented facts to the Commission and/or lacked candor about the consideration for employment of a black job applicant, Linda Johnson, and (2) violated 47 C.F.R. § 73.2080, which provides: "Equal opportunity in employment shall be afforded by all licensees . . . of. . . broadcast stations . . . to all qualified persons, and no person shall be discriminated against in employment because of race, color, religion, national origin or sex." The Review Board found that (1) Serafin discriminated against Johnson because of her race; (2) Serafin lied to the Commission with respect to statements he made to employees of the Comprehensive Employment and Training Administration (CETA) regarding Johnson; (3) Serafin misrepresented to the Commission that he tried to offer a job to Johnson a little more than a week after interviewing her; and (4) Serafin misrepresented that he discussed the job with Johnson again in the presence of her supervisor.

13. We affirm the Board's findings and conclusions with respect to the first two allegations. We find it unnecessary to reach any conclusions with respect to the Board's findings on the second two allegations. Accordingly, the Board's findings and conclusions on those two issues are not incorporated in our final decision in this case.

14. The employment discrimination charge arises from events surrounding Serafin's interview of a black woman, Linda Johnson, for a secretarial position. Johnson had been referred to Serafin by the local CETA office. Serafin did not hire Johnson. The questions at issue are whether Serafin discriminated against hiring Johnson on the basis of her race and whether he made misrepresentations to the Commission concerning this matter. We conclude that he did both.

15. The Objectors filed a copy of the following memorandum, obtained from the CETA office, which stated:

> TO: Memo to files
>
> FROM: [deleted in original]
>
> RE: WBUZ
>
> DATE: October 1980
>
> [deleted in original] called and was all upset. Hank came to her office and screamed at her for not sending good people. Accused her of having it against him. He then called me and started with myself. I indicated that the three persons we sent were all well qualified and had excellent ratings from PSE positions. He was particularly upset that one of the girls was black. Her name was [deleted in original]. His exact words were that, "she would

> make charcoal look white." At this point, I told him that we would not take any more abuses and that if he was not careful he could find himself with a discrimination suit. I do not see why we continue to use this site. I feel that we have been more than fair with this man, but it continues to be a very poor situation and work site. He is only looking for CETA to subsidize his payroll and wants only people that he preselects. I discussed with both Jane and Steve and will not personally deal with the firm again. I do not feel that it is in the best interest of the County or any individual to be involved with this individual.

Mass Media Bureau Ex. 5 at 1.

16. Cheryl Gawronski, the CETA counselor who had referred Johnson to Catoctin in October 1980, alleged as follows in a prehearing affidavit:

> On the same day that Ms. Johnson interviewed at the station, Mr. Henry Serafin called me on the telephone at CETA and complained about my referral of Ms. Johnson to WBUZ. Mr. Serafin stated that Ms. Johnson "would make charcoal look white." I understood this remark to mean that Mr. Serafin was unhappy with the referral of Ms. Johnson solely because she was a black woman.
>
> I contacted my supervisor, Wayne Moore . . . to inform her [sic] of Mr. Serafin's remark. Since 1980 I have had no contact with Mr. Serafin. Ms. Carol Adams of the Chautauqua County Rural Ministry, Inc. contacted me on May 16, 1985 in connection with her organization's complaint of racial discrimination against Mr. Serafin and the radio station.

Mass Media Bureau Ex. 5 at 3. In testifying about this incident, Gawronski added that Serafin had also said, "don't you have any white girls to send me?" in the telephone conversation in question. Tr. at 895.

17. Wayne Moore, who had been Gawronski's supervisor at the time in question, testified that Gawronski had contacted him after her phone conversation with Serafin and told him that she was upset because Serafin had said to her that Linda Johnson would make charcoal look white. Tr. at 1503. Moore testified that Serafin had then spoken with him by telephone and that he had written the memorandum quoted above soon afterward. Tr. at 1506, 1510. Moore alleged that he had subsequently met with Serafin several times in WBUZ's studio; that he had warned Serafin in those meetings that "he could be in a lot of trouble for a discrimination suit if this [were to be] brought up"; and that he had told Serafin that he intended to recommend to his superiors at CETA that they refuse to enter into further job-training contracts with Catoctin because Catoctin had discriminated against Linda Johnson. Tr. at 1504.

18. A CETA official notified Serafin by letter in May 1981 that CETA would no longer enter into on-the-job-training contracts with Catoctin. Objectors' Ex. 3. A second letter denying Serafin's appeal from that ruling indicates that the ruling was based on complaints about working conditions from employees that CETA had placed with Catoctin. Objectors' Ex. 4. The letters do not indicate that any adverse report had been lodged by Moore, Gawronski, or anyone else concerning racial discrimination in Catoctin's hiring.

19. Henry Serafin testified that he had called Cheryl Gawronski on the occasion in question to complain about her procedure. Tr. at 603. "I needed a secretary," he testified, "and they were sending me like a girl every eight or ten days. I wanted them to send more at a time so I could make my interviews and hire somebody." *Id.* Serafin further alleged that because he got no satisfactory response from Gawronski he had complained to her supervisor, Moore, in the same vein. *Id.* Serafin testified that he had no recollection of speaking to any CETA employee specifically about Linda Johnson, denied that he had complained to Gawronski for referring a black job applicant, and denied having said that Johnson would make charcoal look white. Tr. at 605-06, 1260-61.

20. The ALJ and the Board concluded that Moore and Gawronski had testified truthfully and hence that Serafin had lied in denying that he had objected to the referral of Johnson because of her race and in denying that he had spoken the remark about Johnson's color that those witnesses had attributed to him. I.D. at 25-26 ¶¶ 101-03, 32-33 ¶¶ 140-41; 2 FCC Rcd at 2135 ¶ 55, 2137 ¶ 73. In this regard, the lower decisions characterize Serafin's attempt to sustain his position as "a maze of inconsistencies mixed with a liberal amount of fabrication." 2 FCC Rcd at 2135 ¶ 55, quoting *I.D.* ¶ 99. Those decisions maintain that Serafin contradicted himself, first denying having made the alleged remark but later testifying, according to the findings below, that he "could not remember whether he said it or not." 2 FCC Rcd at 2135 ¶ 55; I.D. at 24 ¶¶ 99.

21. We agree that Henry Serafin gave a deceptive account of his conversation with Cheryl Gawronski. We are persuaded, as were the ALJ and the Board, by Moore's contemporaneous memorandum of October 1980 and his subsequent testimony, that Gawronski's account of her conversation with Serafin is accurate. We acknowledge that Moore's memorandum of October 1980 does not disclose whether he based the allegations that Serafin had commented on Johnson's skin color and had been upset because she was black on what Serafin had said to him or on what Gawronski had told him about her prior conversation with Serafin. But Moore's subsequent testimony, although uncertain as to the exact words exchanged between him and Serafin, indicates that Serafin either repeated his disparaging remarks about Johnson to Moore or specifically acknowledged having made them. At the very least, Moore's statements in evidence corroborate Gawronski's by indicating that she had given him a contemporaneous report of her conversation with Serafin that was consistent in material respects with the account that she later gave of it in her sworn statements.

22. We differ from the ALJ and the Board on only one point with respect to their analysis of the issue as to the substance of Serafin's conversations with Gawronski and Moore. Their subsidiary finding that Serafin actually contradicted his denial that he had made the alleged remark about Johnson's color is not supported by the record. Serafin said in the second instance, "I don't recall ever saying that," which is not quite the same as confessing that he could not remember whether or not he had made the remark. Tr. at 1260. Moreover, by his answer to counsel's next question Serafin made it clear that he had not meant to imply that he was unsure about the matter.

The next question was, "Is it possible that you said this to either of these two individuals?" Serafin replied "No." Tr. at 1261. Therefore, unlike the ALJ and the Board, our finding against Serafin on this point is not based on any inconsistency in his own testimony.

23. Despite Catoctin's attempts to discredit Gawronski and Moore, we agree with the ALJ and the Board that these witnesses were credible. Catoctin contends that Gawronski and Moore were both hostile to Henry Serafin as a result of disputes with him that had nothing to do with Johnson's race and that their testimony is consequently tainted by bias. It is evident from the record that Serafin's dealings with Gawronski and Moore culminated in a rancorous altercation. It also seems clear that the altercation was at least partly provoked by Serafin's criticism of Gawronski's referral procedures. Tr. at 897-98, 904, 1507, 1509, 1513.

24. We cannot conclude from the record, however, that Gawronski and Moore lied to the Commission in their testimony, even if we were to agree with Serafin that they both disliked him. The ALJ found no demeanor problems with Gawronski or Moore, and nothing in the record leads us to question their credibility. *I.D.* ¶ 11. All in all, there is evidence, such as Moore's contemporaneous memorandum, in support of their version of events and little more than self-serving statements to support Serafin's account. Consequently, we conclude that it was Serafin who gave a false account of the events in question.

25. Furthermore, we conclude that Serafin deliberately misrepresented facts in his testimony in order to deceive this Commission. Serafin had a compelling motive to contradict Gawronski's and Moore's statements in order to avoid an adverse Commission ruling on the discrimination complaint. Beyond that, however, we find it hard to believe, given Gawronski's and Moore's testimony and the nature of Serafin's remarks about Johnson, that his persistent denials could have been anything but deliberate.

26. In light of the entire record, therefore, we find that Serafin willfully violated 47 C.F.R. § 73.2080 by discriminating against Johnson in initially refraining from even considering her for employment because of her race and that he willfully lied to the Commission in denying that he made any disparaging remarks about Johnson's race to CETA employees. Although Serafin's remark about Johnson's complexion, standing alone, may be of debatable significance, Gawronski's testimony that Serafin had called her shortly after having interviewed the only black applicant referred to him to complain of that referral; that he had angrily asked, "Don't you have any white girls to send me?"; and that Gawronski had understood him to object to the referral for the reason that Johnson was black, clearly indicate that Serafin did not afford Johnson equal opportunity in considering her for employment at Catoctin.

27. Nothing in the record suggests that Linda Johnson was unqualified for the position for which she was interviewed. There was no evidence, for example, that Serafin would have declined to hire a white applicant with qualifications equivalent to Johnson's (as there might have been if there had been a showing that one or more of the white applicants that Serafin had rejected had qualifications as good or better than Johnson's). Serafin never testified that Johnson was unqualified for the secretarial post. Indeed, he apparently conceded her qualifications when he testified that he subsequently attempted to hire Johnson for the position, but was unable to do so because she had already accepted employment elsewhere. Tr. at 1271.

28. Serafin's testimony that he subsequently attempted to hire Johnson, however, does not undermine our finding of discrimination here. If, in fact, Serafin made further inquiries about Johnson's qualifications and decided to offer her the job, he did so only after having been warned by Moore that he "could find himself with a discrimination suit." Gestures of interest in Johnson's candidacy made under the compulsion of Moore's threat prove nothing about Serafin's conduct in failing to consider Johnson fairly in the first instance.

29. Having found that Serafin turned Johnson away at the conclusion of their first interview without encouragement; that he soon afterward called the CETA office to protest the referral of a black job applicant and asked whether there were any white applicants to send instead; and that he deceitfully misrepresented the gist of that conversation in sworn statements before this agency in order to avoid blame, we conclude that the record establishes that Serafin refrained from considering Johnson fairly for employment because of her race.

30. Whether Johnson would have accepted the position at Catoctin for which she had applied, had Serafin offered it to her in the first instance, is likewise of no concern to us. The issue here is whether Serafin denied equal opportunity in employment to Johnson by refraining from even considering her for a job because of her race. We conclude that Serafin violated the rule against employment discrimination and that the violation was willful. We also conclude that his persistent denial of facts relevant to this matter constituted willful misrepresentation with intent to deceive the Commission.

III. MISREPRESENTATION ABOUT ASCERTAINMENT

31. The Review Board and the ALJ concluded that in Catoctin's 1981 renewal application Henry Serafin had deliberately, willfully, and repeatedly misrepresented and concealed facts pertinent to the licensee's compliance with requirements concerning ascertainment of needs and presentation of responsive programming. 2 FCC Rcd at 2137 ¶ 70. More specifically, they held that Serafin had lied in these respects: (1) in stating that Catoctin had interviewed 62 community leaders, including 15 Hispanics, 5 blacks, and 2 American Indians; (2) in stating that managerial personnel had conducted the interviews with leaders; (3) in representing that a person by the name of Dan Warren had mentioned certain public issues in conversation with Serafin; (4) in representing that one Walter Stelnach had discussed community problems with Serafin; (5) in stating that Catoctin had placed problems/programs lists in WBUZ's public file "at the appropriate times"; and (6) in representing in the problems/programs lists that WBUZ had broadcast discussions with certain persons on certain topics on specified dates. 2 FCC Rcd at 2131-34 ¶¶ 32-46, 2137 ¶¶ 70-72; I.D. at 20-21 ¶¶ 82-86, 32 ¶¶ 134-139. Further, the ALJ held, and the Board evidently agreed, that there was "good reason to suspect" that Serafin had lied in representing that he had interviewed various other members of the general public aside from Warren and Stelnach. *I.D.* at 16 ¶¶ 56-58, 21 ¶ 84; 2 FCC Rcd at 2127 ¶ 4, 2132 ¶ 34.

32. We find that Serafin testified falsely, with intent to deceive, in claiming that he had placed annual problems lists in the public file in 1979 and 1980. The record shows that Serafin delegated the task of preparing portions of Catoctin's renewal application, including the preparation of the annual problems list for inclusion in the application, to his employee John Masiker. Masiker testified that he had divided ascertained problems at random between the three problems lists in Catoctin's renewal application, regardless of the dates of the interviews from which they derive, although each list had been designated as pertaining to a particular year of the 1978-81 license term. Tr. at 1965-67, 1969, 1974. The fact that no problem appears in more than one of the lists confirms his testimony in this respect.

33. Serafin gave a confused and contradictory account of pertinent circumstances surrounding the preparation and filing of the annual problems lists. He testified that he had prepared annual problems lists at the end of the first and second years of the term, that he had given those lists to Masiker for reference in preparing Exhibit 13 of the renewal application, and that those annual lists are reproduced in the exhibit. Tr. at 439-40, 444, 461, 465. He also alleged that he, or he and Masiker, had recompiled a single, integrated list of ascertained problems covering all three years of the past license term. Tr. at 461, 464, 494, 837. He testified at Tr. 464 that the problems listed on the first page of Exhibit 13 had been compiled from all three years of the license term, but when the ALJ pointed out that the caption for that list was "PROBLEMS: February 1, 1978 through January 30, 1979," Serafin said that his preceding statement was mistaken and claimed, instead, that the list was a transcription of the annual list for 1978 that he had allegedly placed in the public file in 1979. *Id.*

34. Serafin's testimony that he had prepared the first two lists and placed them in the public file at the end of the first and second years of the license term is belied by his own prior statements in discovery. In answer to interrogatories as to when Catoctin had prepared problems/programs lists, who had prepared them, and when they had been put in the file, Serafin had declared that Masiker had "compiled and typed" the lists on January 29, 1981 and that they had been placed in the public file in February 1981. Mass Media Bureau Ex. 8 at 3 ¶ 7, 15 ¶ 7.

35. We cannot believe that Serafin compiled annual lists each year, gave those to Masiker for incorporation in Exhibit 13, and yet also compiled, or directed Masiker to compile, in January 1981, a single, "overall" list of problems covering all three years. If, as Serafin maintained, he had previously compiled two of the three annual lists that were to be included in the application, then he only needed to compile the third list in January 1981. Preparation of an "overall" list would have been pointless. Masiker, however, testified that he created all three annual lists in January 1981 by randomly dividing a composite list that he had compiled directly from interview reports.

36. We conclude that the earliest and least self-serving of Serafin's contradictory statements on point (those that he gave in his replies to the Bureau's interrogatories), which are consistent with Masiker's relevant testimony regarding the preparation of the annual lists in January 1981, are essentially truthful. Those statements obviously refer to the three "annual" problems/programs lists that Catoctin submitted with its renewal application, not to an alleged "overall" problems list that it did *not* file, and they plainly say that all of those lists were compiled in 1981. We thus conclude that Serafin's testimony that he had compiled annual problems lists in 1979 and 1980 and placed them in the public file then, and that those same lists are reproduced in Exhibit 13 of its application, is false. Further, we conclude that Serafin testified falsely in these respects with an intent to deceive the Commission. Serafin had a motive for testifying that he had compiled the first two lists and placed them in the public file at the close of each of the first two years of the license term: had he testified to the contrary he would thereby have conceded the falsity of the representation in the application as to timely placement of the lists in the public file.

IV. CONTEST VIOLATION AND RELATED MISREPRESENTATION ISSUES

37. The Commission requires broadcasters to conduct contests substantially as advertised: "A licensee that broadcasts or advertises information about a contest it conducts shall fully and accurately disclose the material terms of the contest, and shall conduct the contest substantially as announced or advertised. No contest description shall be false, misleading or deceptive with respect to any material term." 47 C.F.R. § 73.1216. Serafin was accused of willfully violating this provision in two instances by failing to award prizes in promotional contests in accordance with procedures described in broadcast announcements. We reach only the section 73.1216 and the misrepresentation issues related to Catoctin's conduct of the "Comtrex" contest. The facts as found by the ALJ and the Review Board in regard to that contest are as follows.

38. In the fall of 1982, WBUZ broadcast a contest, sponsored by Comtrex, entitled "Get Out of the Cold." The terms of the contest called for boxes to be placed at advertisers' places of business. Members of the public would deposit signed entry blanks in the boxes, and the boxes would then be brought to WBUZ where names would be drawn for small prizes. Each small prize winner would be eligible for a grand prize drawing, and the grand prize winner's name would be sent to New York for a national drawing by Comtrex for a trip to Florida. Comtrex furnished WBUZ with an assortment of small prizes, as well as the grand prize -- a stereo receiver and cassette tape unit with detachable speakers, valued at about200. *I.D.* ¶¶ 115-116; 2 FCC Rcd at 2136 ¶ 65.

39. Serafin approved the broadcast of the contest, leaving its implementation and promotion to Mike Ferguson, WBUZ's program director (from April 1982 to October 1983), Mike Guzzetta, a WBUZ disc jockey (July to November 1982; March to August 1983; and August to December 1984); and Frances Bennett, the WBUZ secretary. The contest prizes and rules were announced and explained over the air. All the Comtrex prizes were on display at WBUZ, except for the stereo, which was used as an on-air monitor at remote locations to promote the contest. In November 1982, the stereo was damaged during a remote broadcast at Hills Department Store. It was dented and the fine tuning knob was broken. *I.D.* ¶¶ 117-118; 2 FCC Rcd at 2136 ¶ 63.

40. Guzzetta and Ferguson both testified that shortly after the arrival of the prizes, Serafin told them that he intended to keep the stereo for the station's use as a monitor. They advised him that the prize had to be awarded as announced, but Serafin was adamant. WBUZ

presented the small prizes pursuant to the contest rules, but the stereo was never awarded. At the hearing, Serafin denied informing Guzzetta and Ferguson of his intention to keep the stereo and maintained that he did not keep it. Serafin could not furnish the names of the various Comtrex winners, however, or the name of the winner of the stereo. He testified that he did not remember having been informed of any winner's name and did not even recall who conducted the drawing. There is no evidence that WBUZ ever sent anyone's name to Comtrex in New York for the Florida trip drawing. *I.D.* ¶¶ 119-122; 2 FCC Rcd at 2136 ¶¶ 64, 65.

41. The stereo drawing was supposed to be held in either January or February 1983. When Guzzetta resumed employment with WBUZ in March 1983, the same Comtrex stereo was still at the station. He recognized it from the damage that he had first observed in November 1982. Further, the same stereo was present at the station's new location during his third tour of duty at WBUZ in 1984. Ferguson testified that the same Comtrex stereo was still at the station when he left WBUZ in October 1983, and Francis Bennett testified that the stereo was still in use there in 1985. *I.D.* ¶¶ 123-124; 2 FCC Rcd 2136 ¶ 66.

42. The ALJ and the Review Board concluded that Catoctin, through its principal, Henry Serafin, willfully violated 47 C.F.R. § 73.1216 by failing to conduct the Comtrex contest substantially as advertised and made material misrepresentations to the Commission, with intent to deceive, regarding this matter. We find no fault in the lower decisions on this issue, and we therefore adopt the findings and conclusions of the ALJ and the Review Board as our own.

V. CONCLUSION

43. We have reviewed the entire record in this proceeding and have made the following findings: (i) Catoctin, through its sole principal, Henry Serafin, willfully violated 47 C.F.R. § 73.2080 by discriminating against a job applicant on the basis of race and made, with intent to deceive, material misrepresentations to the Commission with respect to that matter; (ii) Henry Serafin made, with intent to deceive, material misrepresentations to this Commission in his testimony regarding the placement in Catoctin's public file of its problems/programs list; and (iii) Catoctin willfully violated 47 C.F.R. § 73.1216 by failing to conduct the "Comtrex" contest substantially as advertised and made, with intent to deceive, material misrepresentations to the Commission with respect to that matter.

44. These findings lead us to conclude that Catoctin is unqualified to remain a Commission licensee and that the most appropriate sanction in this case is nonrenewal of its license. The pattern of deliberate misrepresentation demonstrated by this record is, by itself, sufficient grounds for denying Catoctin's renewal application. *William M. Rogers*, 92 FCC 2d 187, 194 (1982); *Sea Island Broadcasting Corp.*, 60 FCC 2d 146, 157 ¶ 27 (1976); *Grenco, Inc.*, 39 FCC 2d 732, 737 (1973); *Nick J. Chaconas*, 28 FCC 2d 231, 233 (1971), recon. denied, 35 FCC 2d 699 (1972), aff'd sub nom., *Chaconas v. FCC*, 486 F.2d 1314 (D.C. Cir. 1973). *See also Character Policy Statement*, 102 FCC 2d 1179, 1209-11 (1986). Our additional findings of employment discrimination and a contest violation in this proceeding in conjunction with the findings of misrepresentation only reinforce the conclusion that Catoctin is unqualified to remain a Commission licensee.

45. Catoctin's conduct as a licensee and throughout these proceedings leads us to conclude that we can no longer have confidence that Catoctin will deal truthfully with this Commission or to operate its station in the public interest. We therefore conclude, after considering Catoctin's alternative arguments and proposed remedies, that our findings on all three issues set forth above compel denial of Catoctin's renewal application. Although we do not lightly decide to deny renewal of a license, we will nevertheless reach such a determination where the record demonstrates that renewal would not serve the public interest. Our analysis of the record here leads us to conclude that this is such a case.

46. Having concluded that Catoctin's application for renewal should be denied based on the above findings, we do not believe that it is necessary to reach the other issues addressed by the ALJ and the Review Board. We neither affirm nor reverse the findings and conclusions regarding any other issue addressed below, and those findings and conclusions do not constitute a part of our final decision in this case.

VI. ORDERS

47. ACCORDINGLY, IT IS ORDERED, That the application for review of Catoctin Broadcasting Corp. of New York, filed May 1, 1987, IS GRANTED.

48. IT IS FURTHER ORDERED, That the findings and conclusions of the Review Board ARE AFFIRMED to the extent indicated herein.

49. IT IS FURTHER ORDERED, That the applications for renewal of license of WBUZ, Fredonia, New York, filed by Catoctin Broadcasting Corp. of New York (File Nos. BR-810202VF and BR 840201UA), ARE DENIED.

50. IT IS FURTHER ORDERED, That Catoctin Broadcasting Corp. of New York IS AUTHORIZED to continue operation of Station WBUZ until 12:01 a.m. of the ninety-first (91st) day following the release of this Order to enable the licensee to conclude the station's affairs; PROVIDED, HOWEVER, That if the licensee seeks reconsideration or judicial review of our Decision, it IS AUTHORIZED to continue to operate the station until 12:01 a.m. of the ninety-first (91st) day following the release of any order on reconsideration or the completion of judicial review, whichever is later. Judicial review is completed when the forum which has jurisdiction to review this proceeding issues its mandate; provided, however, that in a case when the mandate issues prior to the expiration of the period for seeking Supreme Court review and we are advised by the licensee that it intends to seek Supreme Court review, judicial review will not be completed until the Supreme Court denies the petition for certiorari or issues a ruling on the merits affirming the denial of renewal, whichever occurs later.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-518

In re Applications of

TURQUESA ENTERPRISES File No. BPH-850712RL

CHRISTINE G. SANCHEZ File No. BPH-850712RZ

For a Construction Permit for a
New FM Station to operate on
Channel 266C in Hatch, New Mexico

MEMORANDUM OPINION AND ORDER

Adopted: March 14, 1989; Released: March 24, 1989

By the Commission:

1. This proceeding involves mutually exclusive applications for a new FM station at Hatch, New Mexico filed by Turquesa Enterprises and Christine G. Sanchez. The Commission has under consideration a Review Board Memorandum Opinion and Order, *Turquesa Enterprises*, 3 FCC Rcd 1070 (1988), affirming the dismissal of Sanchez's application and denying a Joint Request for Approval of Settlement Agreement filed by Sanchez and Turquesa; an Application for Review filed April 6, 1988 by Sanchez; and a Motion for Leave to File Supplement and Supplement to Application for Review, filed July 1, 1988 by Sanchez. In the Motion for Leave to File Supplement and in the Supplement, Sanchez asks the Commission to consider the recent ruling in *St. Croix Wireless Co.*, 3 FCC Rcd 4073 (Jul. 1, 1988). The *St. Croix* ruling was released after Sanchez filed her application for review. Thus, there is good cause for the motion and we will grant leave to file the supplement.

2. The hearing designation order directed Sanchez and Turquesa to file written notices of appearance and pay the6,000 hearing fee required by 47 C.F.R. § 1.221 by December 18, 1987. *Hatch Broadcasting, Inc.*, 2 FCC Rcd 7086 (1987). Turquesa filed a notice of appearance. Sanchez did not file a notice of appearance and she did not pay the hearing fee as required by section 1.221 or seek a waiver of that requirement pursuant to 47 C.F.R. § 1.1115. Sanchez alleges that she negotiated a settlement agreement with Turquesa Enterprises on December 17, 1987. The agreement was not filed December 18 because it had not been executed. The ALJ dismissed Sanchez's application because she failed to file a notice of appearance, pay the required hearing fee or file a settlement agreement by December 18 as required by section 1.221. *Turquesa Enterprises*, FCC 88M-211 (ALJ Jan. 29, 1988).

3. Sanchez filed a notice with the Review Board that she would appeal the ALJ's order dismissing her application. Sanchez, however, never appealed the dismissal order. Instead, Sanchez and Turquesa filed a Joint Request for Approval of Settlement Agreement with the Board. In *Turquesa Enterprises*, 3 FCC Rcd 1070 (1988), the Board treated the Joint Request as an appeal. Finding that the ALJ had properly dismissed Sanchez's application, the Board denied the Joint Request. 3 FCC Rcd at 1070 ¶ 2.

4. Sanchez argues that the parties' proposed settlement should be approved because it is consistent with the Commission's intent to use the6,000 hearing fee to encourage settlements. *Fee Collection Program*, 2 FCC Rcd 947, 966 ¶ 144 (1987). She also contends that the dismissal of her application is inconsistent with recent rulings in *St Croix* and *Spanish International Communications Corp.*, 2 FCC Rcd 3336 (1987). In light of our resolution of this matter, no further discussion of those cases is required.

5. Initially, it is clear that the ALJ acted in conformance with existing Commission precedent. Section 1.221 required Sanchez to file a notice of appearance and pay the $6,000 hearing fee. This obligation was not affected by the parties' ongoing settlement negotiations. The note to section 1.221 states that:

> In filing the Notice of Appearance, the applicant should clearly indicate that a settlement has been filed. (The fact that there are ongoing negotiations that may lead to a settlement does not affect the requirement to pay the hearing fee). If the settlement is not effectuated, the hearing fee must be paid immediately.

The parties did not file their settlement agreement and Sanchez did not file a Notice of Appearance, pay the filing fee, or request a waiver of section 1.221 on the prescribed date.

6. Notwithstanding this conclusion, it is also clear that Sanchez could appeal a denial of her present application for review, delaying the resolution of this proceeding and the institution of a new service in Hatch, New Mexico. All of the parties have consented to the agreement and approval of the agreement will terminate the proceeding and conserve the resources of the applicants and the Commission. Thus, there are strong public interest reasons for approving the parties' settlement agreement. However, Sanchez failed to file a notice of appearance and pay the $6,000 hearing fee as required by section 1.221 of the Rules. In adopting the $6,000 hearing fee, the Commission considered both the timing of when the fee should be paid and the effect that the fee would have on settlements. *Fee Collection Program*, 2 FCC Rcd 947, 965-67 ¶¶ 137-145. The Commission found that the efficiency of its processes will be served best by requiring payment of the hearing fee with the notice of appearance, that the "$6,000 hearing fee would be an impetus for settlement," and that it would encourage applicants with "little hope of prevailing under established standards to drop out of the process." 2 FCC Rcd at 966 ¶ 144. The Commission also established a 25 percent penalty in cases where it accepts a late filed hearing fee. 2 FCC Rcd at 957 ¶ 62; 47 C.F.R. § 1.1114 (Penalty for Late or Insufficient Payments).

7. Even though the settlement will terminate this proceeding and facilitate the institution of a new broadcast service, the parties have not complied with the well-grounded provisions of section 1.221. Thus, it would not be appropriate to approve the settlement agreement without ensuring that our action will not vitiate the effective-

ness of section 1.221 by encouraging other applicants to evade the procedures established to facilitate settlements while they engage in prolonged settlement negotiations. Accordingly, conditioned on the payment of the $6,000 hearing fee by Sanchez, together with the payment of an additional $1,500 penalty as required by section 1.1114, we will reinstate Sanchez's application for the limited purpose of participating in the settlement and we will approve the settlement agreement. This will further our policy of encouraging settlements to facilitate new service while giving applicants notice that incomplete settlement negotiations will not exempt them from complying with the requirements of sections 1.221 and 1.1114 of the Commission's Rules.

8. The Joint Request fully complies with the provisions of 47 U.S.C. § 311(c) and 47 C.F.R. § 73.3525(a) that govern settlement agreements. Attached to the Joint Request are a copy of the agreement between Turquesa and Sanchez and certifications from Turquesa and Sanchez that their applications were not filed for the purpose of reaching or carrying out a settlement agreement. Subject to compliance with the conditions set forth in paragraph 7, above, the Joint Request will be granted and the settlement agreement approved.

9. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to File Supplement, filed July 1, 1988 by Christine G. Sanchez IS GRANTED; and that the Supplement to Application for Review filed July 1, 1988 by Christine G. Sanchez IS ACCEPTED.

10. IT IS FURTHER ORDERED, That the Application for Review filed April 6, 1988 by Christine G. Sanchez IS GRANTED to the extent indicated herein and in all other respects IS DENIED and the Review Board's Memorandum Opinion and Order, 3 FCC Rcd 1070 (1988), IS SET ASIDE.

11. IT IS FURTHER ORDERED, That conditioned on the payment of7,500 by Christine G. Sanchez pursuant to 47 C.F.R. §§ 1.221 and 1.1114, the application (File No. BPH-850712RZ) filed by Christine G. Sanchez IS REINSTATED for the limited purpose of allowing Christine G. Sanchez to participate in the settlement; the Joint Request for Approval of Settlement Agreement filed February 11, 1988 by Turquesa Enterprises and Christine G. Sanchez IS GRANTED; the application (File No. BPH-850712RZ) filed by Christine G. Sanchez IS DISMISSED; the application (File No. BPH-850712RL) filed by Turquesa Enterprises IS GRANTED; and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-399

In re Applications of

NEWTON TELEVISION LIMITED	File No. BPCT-850827KJ
NEWTON TELEVISION, INC.	File No. BPCT-850828KK
VANGUARD BROADCASTING	File No. BPCT-850828KU
PRESS BROADCASTING COMPANY	File No. BPCT-850828KV
NEWTON BROADCASTING COMPANY, LTD.	File No. BPCT-850828KY
MOUNTAIN BROADCASTING CORPORATION	File No. BPCT-850828LA

For Construction Permit for a
New Television Station at
Newton, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: March 14, 1989; Released: March 24, 1989

By the Commission:

1. This proceeding involves mutually exclusive applications for a new UHF television station on Channel 63, at Newton, New Jersey. The Administrative Law Judge granted the application filed by Mountain Broadcasting Corporation under the standard comparative issue. *Bogner Newton Corp.*, 2 FCC Rcd 4792 (1987). The Review Board affirmed. *Newton Television Limited*, 3 FCC Rcd 553 (1988). Now before the Commission are applications for review filed March 7, 1988 by Newton Broadcasting Company, Ltd.; March 8, 1988 by Newton Television, Inc. (NTI); March 9, 1988 by Vanguard Broadcasting and by Press Broadcasting Company; and March 28, 1988 by Newton Television Limited (NTL); and an opposition filed April 5, 1988 by Mountain. Based on our review of the record in this proceeding and the pleadings filed by the parties, we will affirm the grant of Mountain's application. The applications for review, however, raise some matters which merit further comment.

2. *Mountain's Comparative Coverage Preference:* Under *Agreement Effected by Exchange of Notes Signed at Ottawa April 23 and June 23, 1952*, United States-Canada, T.I.A.S. No. 2594, the maximum effective radiated power (ERP) for United States television stations located within 250 miles of the Canadian border is limited to 1000 kilowatts, unless the Canadian government consents to operation with a higher ERP. Mountain proposes to operate its station with 5000 kilowatts ERP. The station will be located within 250 miles of the Canadian border. As a result, Canadian consent is required for Mountain's proposed operation. The Board affirmed the coverage preferences awarded by the ALJ to Mountain and the other applicants that proposed 5,000 kilowatt operations. *Newton Television Limited*, 3 FCC Rcd at 556-57 ¶¶ 12-16. Vanguard and NTL argue, among other things, that Mountain should not be awarded a coverage preference on the basis of its 5000 kilowatt proposal without a showing of Canadian concurrence.

3. In a letter dated January 14, 1986, the Government of Canada, Department of Communications, advised the Commission that the Canadian government "would have no objection" to Mountain's 5000 kilowatt proposal. Although a copy of the letter from the Canadian government agreeing to Mountain's proposed operation with 5000 kilowatts is in the Commission's files, it was not made part of the record in this proceeding. We shall rectify that oversight by taking official notice of that letter pursuant to 5 U.S.C. § 556(e). Official notice permits the Commission "to dispense with the conventional process of proof . . . when the matter in question is . . . some document or record that is in the agency's files (in which case it is an item that can be produced or identified)." B. Schwartz, Administrative Law § 7.16 at 376 (2d ed. 1984). Our action renders moot Vanguard's and NTL's arguments in this respect. Accordingly, we affirm the comparative preference awarded Mountain for its superior coverage proposal.

4. *NTL's Limited Partnership:* The ALJ, citing *Cotton Broadcasting Co.*, 104 FCC 2d 473, 475-77 ¶¶ 3-4 (Rev. Bd. 1986), refused to credit NTL for the full-time integration of its sole general partner because that general partner was also a limited partner. *Bogner Newton Corp.*, 2 FCC Rcd at 4803 ¶ 122. The Board did not consider NTL's integration proposal in affirming the ALJ's evaluation of the integration proposals of the respective applicants. *Newton Television Limited*, 3 FCC Rcd at 556 ¶ 11. For the reasons that follow, we hold that NTL is entitled to credit for the integration of its general partner.

5. The Board's ruling in *Cotton* denying integration credit for a general partner who is also a limited partner has been overturned. *Cotton Broadcasting Co.*, 4 FCC Rcd _____ (1989). There we recognized that it would be inconsistent with the Commission's attribution and integration policies to deny credit for the integration of a general partner because that partner also owns a limited partnership interest. We further noted that the Revised Uniform Limited Partnership Act (RULPA) authorizes the dual ownership of general and limited partnership interests, and that the Commission has relied on the RULPA in developing its policies for the attribution of limited partnership interests. In addition, we recognized that general partners may invest in limited partnership interests for valid economic reasons. Thus, we concluded that the refusal to recognize the integration of a general partner because that partner also owns a limited partnership interest could unduly restrict the capacity of entrepreneurs to organize and finance partnership arrangements and could adversely affect the ability of

applicants to raise capital for the financing of their applications. *Victory Media, Inc.*, 3 FCC Rcd 2073, 2075 ¶ 19 (1988).

6. Although we are modifying the Board's decision in light of our subsequent *Cotton* ruling, the crediting of NTL for the quantitative integration proposal of its general partner does not warrant a different result in this case. Regardless of whether NTL is awarded the 100 percent integration credit it claimed or the 25 percent integration credit the ALJ would have awarded it if he did not follow *Cotton*, NTL is still comparatively inferior to Mountain. *Bogner Newton Corp.*, 2 FCC Rcd at 4803 ¶ 123. As the Board aptly pointed out, Mountain is the clear comparative winner under the integration criterion because its 100 percent quantitative integration proposal is qualitatively enhanced not only by its principals' minority status and broadcast experience, but also by local residence and by participation in extensive community activities. *Newton Television Limited*, 3 FCC Rcd at 556 ¶ 11. In contrast, NTL's integration proposal is not enhanced by local residence in the Newton area or by local community activities. *Id.* Moreover, as we have already held, Mountain is also entitled to a comparative preference over NTL because of its superior coverage proposal.

7. ACCORDINGLY, IT IS ORDERED, That the Applications for Review filed March 7, 1988 by Newton Broadcasting Company, Ltd., March 8, 1988 by Newton Television, Inc., and March 9, 1988 by Press Broadcasting Company and by Vanguard Broadcasting ARE DENIED.

8. IT IS FURTHER ORDERED, That the Application for Review filed March 28, 1988 by Newton Television Limited IS GRANTED to the extent indicated herein, and in all other respects IS DENIED.

9. IT IS FURTHER ORDERED, That the Decision of the Review Board, *Newton Television Limited*, 3 FCC Rcd 553 (Rev. Bd. 1988) IS MODIFIED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GRAPHNET, INCORPORATED — File No. I-T-C-89-045

Application for authority to lease and operate facilities for service to Bulgaria.

ORDER AUTHORIZATION AND CERTIFICATE

Adopted: March 14, 1989; Released: March 24, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on January 19, 1989 by Graphnet, Incorporated, requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for direct service between the U.S. and Bulgaria and beyond. The application was placed on public notice on February 1, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Bulgaria by Graphnet.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-045 IS GRANTED, and Graphnet is authorized to:

a. lease from Comsat and operate one voice-grade satellite half-circuit between an appropriate earth station on the east coast of North America and a satellite over the Atlantic Ocean, connecting with a similar half-circuit between the satellite and an earth station in Bulgaria furnished by Graphnet's correspondent in Bulgaria;

b. multiplex that circuit to provide up to 24 telex and/or telegraph channels;

c. lease from AT&T and operate one voice-grade circuit in the east coast earth station;

d. lease and operate necessary domestic connecting facilities; and

e. use said facilities to provide Graphnet's regularly authorized services between the U.S. and Bulgaria and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between Graphnet and its correspondent in Bulgaria, and a copy of the agreement shall be filed with the Commission within 30 days of their execution.

5. This authorization shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1987).

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-2
Phase I

In the Matter of

Filing and Review of Open
Network Architecture Plans

Petition for Declaratory
Ruling by the NYNEX
Telephone Companies

ORDER

Adopted: March 17, 1989; Released: March 20, 1989

By the Chief, Common Carrier Bureau:

1. On March 14, 1989, Tymnet-McDonnell Douglas Network Systems Company (Tymnet) and Telenet Communications Corporation (Telenet) filed a Motion to Establish Procedures or in the Alternative for Extension of Time in the above-captioned proceeding, which is addressing whether a gateway service proposed by NYNEX is basic or enhanced.[1] This motion requests in the alternative that we (a) establish a new proceeding to consider, as a new petition for declaratory ruling, US West's comments in this proceeding, filed on March 1, 1989, or, (b) extend the time for filing reply comments in this proceeding until April 11, 1989, so that parties will be able to respond to the US West comments. Reply comments are presently due on March 21, 1989.

2. Tymnet and Telenet express concern about being able to respond adequately to US West's comments, which, they state, are 56 pages in length and, in addition to supporting NYNEX's petition, seek a Commission ruling that US West's gateway service is a basic service within the *Computer III* rules. Telenet and Tymnet assert that US West's proposed gateway differs from NYNEX's service in both service description and technical specifications. They claim that US West's comments expand the scope of this proceeding by seeking Commission approval of certain future developments in its gateway offering. Telenet and Tymnet also express concern that US West's comments raise substantial new jurisdictional questions and other broad policy issues. Finally, Telenet and Tymnet assert that additional public notice is necessary to ensure that all interested parties have an opportunity to comment on how the gateway service described by US West will affect them.

3. Although we have not determined whether it would be appropriate to consider all questions discussed in the US West comments, we agree that it would be desirable to afford all parties an opportunity to respond fully. While it is the policy of this Commission that extensions of time shall not be routinely granted,[2] we acknowledge that the public interest will be served by the preparation of a fully developed record in this proceeding. However, in light of the public interest in early resolution of the issues raised in the NYNEX petition and the associated record, we find that the extension of time requested by Telenet and Tymnet is not warranted. Instead, we shall extend the time for filing reply comments by two weeks, to April 4, 1989. This extension should provide all parties with sufficient time to prepare reply comments without unduly delaying the completion of this proceeding.

4. Accordingly, IT IS HEREBY ORDERED, pursuant to Sections 4 (j) and 5 (c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 (j) and 155 (c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, that the motion described in paragraph 1 above is DENIED IN PART AND GRANTED IN PART as specified herein. Reply Comments in this proceeding are due on or before April 4, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Petition for Declaratory Ruling of the NYNEX Telephone Companies, filed Jan. 17, 1989 (NYNEX Petition).

[2] Section 1.46(a) of the Commission's Rules, 47 C.F.R. § 1.46(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-287

In the Matter of

CONTEL SERVICE CORPORATION — Transmittal No. 7
Revisions to Tariff F.C.C. No. 1

MEMORANDUM OPINION AND ORDER

Adopted: March 16, 1989; Released: March 20, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On November 15, 1988, Contel Service Corporation (Contel) filed a tariff to offer Feature Group D (FGD) service via a Centralized Equal Access (CEA) arrangement. Contel plans to deploy an alternate technology, Northern Telecom's LATA Equal Access System (LEAS) software, at the CEA in order to provide "virtual equal access" for non-electronic end offices connected to the CEA. MCI Communications Corporation (MCI) filed a petition to suspend and investigate Contel's proposed tariff revisions on November 30, 1988. Contel filed its reply on December 9, 1988. The proposed tariff revisions are scheduled to become effective on April 1, 1989.

II. DESCRIPTION OF SERVICE

2. Contel states that this filing will enable Contel to use the traffic aggregation characteristics of CEA to provide FGD capabilities to interexchange carriers (ICs). Contel further states that LEAS will be installed in the CEA so that virtual equal access capabilities can be extended to non-electronic end offices connected to the CEA. According to Contel, the primary benefit of the proposed service configuration is the accelerated provision of the benefits of IC competition to widely dispersed rural end users on a cost effective basis.[1] Contel states that the use of alternate technologies is not a permanent solution to upgrading switch technology in non-electronic end offices, and that the network will continue to be enhanced whenever the public interest will be served.[2]

3. Contel explains that all of the major features of FGD will be provided on an equal basis to all ICs, except that direct trunking will be precluded by the tandem based nature of CEA, and 10XXX dialing will not be available in certain non-electronic end offices. In offices where 10XXX dialing will not be available, "access to alternate carriers" will be provided through Feature Group A (FGA) or Feature Group B (FGB) connections.[3] Although operator services to ICs will generally not be affected by CEA, Contel explains that "0+" dialing will not be available to end users served by crossbar offices; only "0-" dialing will be available in these offices.[4]

4. Contel also discusses the issue of post-dial delay associated with the use of alternate technologies.[5] Contel asserts that due to the cost and other limitations of performing a study of its own, it has researched other studies of post-dial delay using equipment comparable to its own,[6] and has concluded that these provide a valid source for comparison with Contel's own network. Contel concludes that since the Commission has found these delay times acceptable in the past,[7] that post-dial delay should have no impact on the current tariff transmittal.[8]

5. Contel states that prior to implementation, it will file the appropriate rate changes, including equal access cost recovery charges. Pursuant to Part 69 of the Commission's Rules,[9] the premium rate will be applied to all access minutes originating and terminating at all end offices served by CEA and LEAS. Contel plans to charge the transitional LS1 rate for all FGA and FGB minutes.[10] Contel asserts that this plan is reasonable given the provision of FGD capabilities to all ICs, and because the Commission requires[11] independent telephone companies (ITCs) to offer the ICs the same services offered AT&T. Furthermore, LEAS will only be used until the necessary switch replacements are made.[12]

6. Although Contel's Section 214 application contains details of the CEA offering in Indiana, a brief summary is provided in the D&J. Contel plans to install equal access software in 57 of 69 end offices subtending the Seymour, Indiana, access tandem, and LEAS will be installed at the tandem to provide equal access to those offices not equipped with the software. Interconnection points will be provided at several points in the network, besides at Seymour, which will be identified later in the tariff. According to Contel, only 8.6 percent (approximately 10,618) of the access lines served by Contel of Indiana will be served by crossbar switches which will not provide 10XXX or "0+" international dialing. Contel asserts that phase out of LEAS and the crossbar switches for Indiana will take place by 1992. All end offices will then have full FGD capabilities without any LEAS-related post-dial delay.[13]

7. In its summary of tariff changes, and Attachments 1 and 3 to its D&J, Contel indicates that LEAS will be used to provide virtual equal access to a total of 12 exchanges, representing approximately 15 percent (18,389) of the access lines served by Contel of Indiana, including the crossbar switches discussed above. Contel avers that LEAS will be phased out by 1992, and states that the locations where ICs may interconnect, as well as the charges to be levied, will be added to the tariff at a future time. The tariff changes filed with the D&J do not indicate where CEA and LEAS will be available and offered, and Contel states that each geographic area where CEA and LEAS are offered will be designated in future tariff filings.[14]

III. SUMMARY OF PLEADINGS

8. MCI argues that because a significant controversy regarding the use of alternate technologies by various Bell Operating Companies (BOCs) is pending before the Commission,[15] this transmittal should be suspended and investigated pending a resolution of that dispute. Specifically, MCI objects to the post-dial delay caused by LEAS and the inability of ICs to receive automatic number identification (ANI) on 800 Service and 900 Service calls. It notes that these matters are being investigated in the *Alternate Technology Investigation*. In addition, MCI objects to the inability of Contel's proposed deployment to

provide 10XXX dialing and "0+" international dialing in some end offices. MCI contends that this service offering is not equal access, and therefore the charging of premium rates is not permissible.[16]

9. MCI characterizes Contel's recognition that LEAS should only be used on an interim basis as an admission that alternate technologies cause long term degradation to the network, but observes that Contel's plan to convert to full equal access within three years is consistent with current Commission requirements.[17] MCI objects to the post-dial delay caused by LEAS, and asserts that MCI has shown that delays caused by LEAS can be as great as 19 seconds. MCI also objects to Contel's assertion that the Bellcore study Contel cites has been adopted by the industry, or that the methodologies for measurement have been accepted by the industry. MCI further charges that Contel has not participated in the Industry Carrier Compatibility Forum (ICCF) subcommittee which has been studying the problems of post-dial delay and alternate technologies.[18]

10. MCI asserts that the lack of 10XXX dialing capability in some offices raises issues closely resembling NYNEX's minimum divergence access service (MDAS) filing.[19] MCI indicates that it would support a tariff that is consistent with the terms of NYNEX's MDAS filing, and requests the Commission to require Contel to assess non-premium access charges until full FGD is provided to ICs, and grant the necessary waivers to permit the charging of less than full premium access.[20]

11. The Contel reply objects to MCI's characterization that LEAS degrades the network, and insists that LEAS greatly enhances the network by bringing new service to rural customers which otherwise would not be available. Contel asserts that since the service supplied through the use of LEAS will be equal for all ICs, premium rates are justified. Contel avers that the Commission had "acknowledged the inherent benefits" of this plan by granting Section 214 authorizations,[21] specifically the provision of IC competition sooner and more economically. Contel also notes, in response to MCI's request that this filing be suspended until the *Alternate Technology Investigation* is complete, that no issues have been designated in that investigation.[22]

12. In defense of its filing, Contel states that its CEA plans are not equivalent to the use of alternate technologies by the BOCs because Contel has not received bona fide requests for equal access, and Contel is proposing this offering to attract IC competition and to provide ICs economical equal access. Contel disputes MCI's characterization of the post-dial delay caused by LEAS, and asserts that the industry has acknowledged the validity of the post-dial delay measurement techniques used by Bellcore in its studies. Contel characterizes MCI's claims regarding the provision of ANI for 800 Service and 900 Service calls as false, stating that sources contacted by Contel, including Northern Telecom (the manufacturer of LEAS), US West, and Contel's own engineers, assure Contel that ANI would be available. Furthermore, although Contel recognizes that 10XXX limitations exist under its plan, it argues that only a small portion of the CEA offering is affected, and will be completely phased out within three years.[23]

13. Contel concludes it should be allowed to charge premium rates, asserting that the Commission has allowed tariffs to become effective charging premium rates for FGD traffic at end offices served by alternate technologies.[24] Contel states that even in the *NYNEX MDAS Order*, cited by MCI, the Commission simply allowed NYNEX to offer less than premium rates for FGA and FGB at end offices where 10XXX was not available. In addition, Contel asserts, MCI ignores the *Phase III Order* finding that the ITCs are not subject to the same requirements for the provision of equal access as the BOCs. Finally, Contel argues that IC access which is provided on equal terms to all ICs should be charged at premium rates.[25]

14. Contel also filed a petition for waiver of Sections 69.205 and 69.206 of the Commission's Rules, 47 C.F.R. §§ 69.205, 69.206, on February 27, 1989.[26] The petition requested a waiver of the Commission's rules to the extent necessary to permit Contel to charge premium access charges for FGD traffic and non-premium access charges for FGA and FGB traffic originating from or terminating in end offices within CEA where 10XXX and 0+ international dialing are not available. Contel states that good cause exists for the granting of the waiver because the provision of CEA in these end offices provides many, but not all, of the benefits of equal access, increases competition, and provides more service options for end users.[27] To reflect the rates described in its waiver request, Contel filed Transmittal No. 17, on February 28, 1989.[28]

IV. DISCUSSION

15. We conclude that Contel, at this time, warrants a waiver of Sections 69.205 and 69.206 of the Commission's Rules because the deployment of CEA increases IC competition and provides more service options for end users. Furthermore, although the same type of access is provided to all ICs in the subject end offices, many, but not all, of the benefits of equal access are provided.[29] The Bureau grants this waiver, however, on the same terms and conditions that a similar waiver was granted for NYNEX's MDAS service.[30] Accordingly, we require Contel to reballot affected customers at the time access is provided in these end offices that satisfies all of the equal access requirements.[31]

16. The Common Carrier Bureau has reviewed the tariff transmittals and pleadings filed by Contel and MCI. We find that no compelling argument has been presented that the tariff is patently unlawful so as to require rejection. However, we do find that this transmittal presents certain issues regarding LEC use of alternate equal access technologies that warrant investigation. Inasmuch as we have already initiated an investigation to examine the use of alternate technologies in the *Alternate Technology Investigation*, which presents similar questions, we will include this transmittal in that ongoing investigation. We have recently reformulated the issues in the *Alternate Technology Investigation*,[32] and accordingly require Contel to respond to the issues in that *Designation Order* to the extent that such required information is available to Contel.[33]

17. The *Designation Order* applies only to certain BOCs at this time. Recognizing that different circumstances may apply to Contel and other ITCs, and that different requirements have been imposed upon them by the Commission in recognition of these differences,[34] we additionally designate the following issue for response by Contel in this investigation:

What additional considerations should be taken into account in applying any conclusion reached in this investigation to ITC use of alternate technologies? What effect should these considerations have on the resolution of each of the issues in the *Designation Order*, and upon the use of alternate technologies by ITCs?

18. We have also concluded that Contel's proposal should be subject to accounting safeguards to assure that ratepayers are not required to pay excessive rates. Imposition of such safeguards through an accounting order balances the interests of ICs subscribing to alternative equal access using LEAS, Contel, and Contel's ratepayers.

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that the petition against Contel Tariff F.C.C. No. 1, Transmittal No. 7, filed by MCI Communications Corporation IS GRANTED to the extent indicated herein, and otherwise IS DENIED.

20. IT IS FURTHER ORDERED that the Contel Service Corporation petition for waiver of Sections 69.205 and 69.206 of the Commission's Rules IS GRANTED subject to the conditions described herein.

21. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 4(j), 201-205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201-205, and 403, and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, an investigation IS INSTITUTED into the lawfulness of the above-captioned tariff revisions and IS INCORPORATED into the Commission's ongoing investigation in CC Docket No. 88-287.

22. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

23. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Contel Service Corporation SHALL KEEP accurate account of all amounts received pursuant to LATA Equal Access System rates which are the subject of this investigation.

24. IT IS FURTHER ORDERED that Contel Service Corporation SHALL FILE a supplement reflecting the suspension no later than March 24, 1989. For this purpose Special Permission No. 89-208 is assigned.

25. IT IS FURTHER ORDERED that Contel Service Corporation SHALL BE a party to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Contel Description and Justification (D&J) at 1-2. Contel states that this filing was made pursuant to a Common Carrier Bureau Order granting an application under Section 214 of the Communications Act of 1934, 47 U.S.C. § 214 (Act), in Contel of Indiana, Inc., Memorandum Opinion, Order, and Certificate, 3 FCC Rcd 4298 (1988) (*Indiana Order*). Contel D&J at 1 n.1. Contel states that it is planning other CEA arrangements within the Contel network. *See* Application of Contel of Iowa, Inc., Order and Authorization, File No. W-P-C-6285, released Nov. 3, 1988 (*Iowa Order*), *cited in* Contel D&J at 1 n.2.

[2] Contel D&J at 2-3.

[3] *Id.* at 4.

[4] *Id.* In Attachment 2 to its D&J, Contel has provided an affidavit certifying the availability of operator services to end users served by the Indiana CEA arrangement. Contel filed this affidavit pursuant to this Bureau's directive in the *Indiana Order*, 3 FCC Rcd at 4301.

[5] Contel D&J at 4.

[6] *Id.* at 5 & n.11 (citing Northern Telecom, Inc., DMS-200 LEAS Equal Access Call Timing Study, Bellcore Special Report SR-TSY-001504 (June 1988)).

[7] *Id.* at 6 & n.14 (citing Mountain States Telephone, Northwestern Bell Telephone, and Pacific Northwest Telephone, Transmittal No. 104, Order, 3 FCC Rcd 5085 (1987) (*US West Order*); New York Telephone Company, Transmittal No. 875 and New England Telephone and Telegraph Company, Transmittal No. 901, Order, 3 FCC Rcd 2311 (1988) (*NYNEX MDAS Order*)).

[8] *Id.* at 4-6.

[9] 47 C.F.R. Part 69.

[10] The access rate for FGB service (LS1) is a discount from the premium FGD rate (LS2). The LS1 discount is currently .83 of the FGD rate, to be phased out by 1993. *See* Section 69.201 *et seq.* of the Commission's Rules, 47 C.F.R. § 69.201 *et seq.*

[11] Contel D&J at 7 & n.16 (citing MTS and WATS Market Structure, CC Docket No. 78-72, Phase III, 100 FCC 2d 860 (1985) (*Phase III Order*)). In this Order the Commission discussed the unique characteristics and problems of the ITCs in providing equal access, and required that equal access provided to all ICs must only be equal in type and quality. 100 FCC 2d at 877.

[12] Contel D&J at 6-8.

[13] *Id.* at 8-10.

[14] *Id.* at 10-12 & Attachments 1, 3.

[15] *See* Southwestern Bell Telephone Company, Transmittal No. 1629, CC Docket No. 88-287, Memorandum Opinion and Order, 3 FCC Rcd 3694 (1988), Order, 3 FCC Rcd 4527 (1988), Order, 3 FCC Rcd 5786 (1988); New England Telephone and Telegraph Company, Transmittal No. 925, Memorandum Opinion and Order, 3 FCC Rcd 5789 (1988) (incorporating the investigation of New England's proposed tariff revisions into CC Docket No. 88-287) (*Alternate Technology Investigation*).

[16] MCI Petition at 2, 4-6.

[17] *Id.* at 3-4 (citing *Phase III Order*). In the *Phase III Order* the Commission determined that, *inter alia*, the ITCs had three years from the date of a bona fide request for equal access from an IC to provide such access.

[18] *Id.* at 3-6.

[19] *See NYNEX MDAS Order*. MDAS did not provide for 10XXX dialing, in addition to other deficiencies. MDAS, however, is an optional service. MDAS customers will be reballoted upon the provision of equal access, a report concerning post-dial

delay was filed with the Commission, and the rate charged is at a discount from the full Part 69 premium rates. A waiver of Part 69 was granted for the implementation of the discounted rate. MCI Petition at 4-5 n.7 & n.8, & 7.

[20] *Id.* at 4, 7.

[21] Contel Reply at 1-3 (citing *Indiana Order*, 3 FCC Rcd 4300-02; *Iowa Order*).

[22] Contel Reply at 1 n.1.

[23] *Id.* at 3-5.

[24] *Id.* at 5 & n.9 (citing *Alternate Technology Investigation; US West Order*).

[25] *Id.* at 5-7.

[26] A waiver of Sections 69.205 and 69.206 is necessary because Contel's proposed tariff revisions would establish charges which are higher than the non-premium rate for FGD access in certain end offices which are included in the CEA arrangement.

[27] Contel Application for Waiver at 1-2.

[28] Transmittal No. 17 was filed pursuant to Application No. 6, filed by Contel on February 24, 1989, and Special Permission No. 89-188, granted by the Bureau on February 28, 1989.

[29] We note that the term "equal access" and Part 69 of the Commission's Rules require more than the mere provision of similar access to all ICs. While the specific features of an equal access offering have not been delineated by the Commission, 10XXX and 0+ international dialing, among other features, are commonly recognized as necessary components. *See, e.g., Phase III Order*, 100 FCC 2d at 876-77.

[30] *See NYNEX MDAS Order*.

[31] In the *NYNEX MDAS Order* we required NYNEX to file a report with the Commission regarding the post-dial delay experienced with MDAS. *NYNEX MDAS Order*, 3 FCC Rcd at 2312. Due to a number of factors we will not require Contel to submit a similar report at this time. These factors include the fact that we are currently investigating post-dial delay and other issues regarding the use of alternate technologies, and that FGD service in end offices where 10XXX and 0+ international dialing are not available is (1) optional, (2) temporary pending replacement of the affected end offices, (3) limited to a small number of end offices, (4) otherwise subject to the same conditions as those reflected in the *NYNEX MDAS Order*, and (5) offered at rates below premium access rates.

[32] Southwestern Bell Telephone Company, Transmittal No. 1629; New England Telephone and Telegraph Company, Transmittal No. 925; Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company, Transmittal No. 104; Pacific Bell Telephone Company; and New York Telephone Company, CC Docket No. 88-287, Order Designating Issues for Investigation, DA 89-309, released Mar. 17, 1989 *(Designation Order)*.

[33] Contel is subject to the pleading cycle set forth in the *Designation Order*.

[34] *See Phase III Order*.

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